Supreme Court, U.S.
FILED

94 149 JUL 25 1994

No.

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR MID KANSAS SAVINGS & LOAN ASSOCIATION AND FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, PETITIONER

v.

HOMELAND STORES, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DREW S. DAYS, III
Solicitor General

PAUL BENDER
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

ELLEN B. KULKA
General Counsel

ANDREW E. TOMBACK
Deputy General Counsel

MARK P. HILEMAN
Acting Assistant General Counsel

MICHAEL P. CONDON
P. MATHEW SUTKO
Counsel
Resolution Trust Corporation
Washington, D.C. 20403

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the statutory requirement that claimants exhaust an administrative claims process before suing the receiver of a failed federally insured financial institution is limited to claims brought by creditors of the failed institution, or instead also applies to claims based upon acts or omissions of the receiver of the institution.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Bob's Super Saver, Inc. was a defendant in the district court.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	6
Conclusion	13
Appendix A	1a
Appendix B	15a
Appendix C	33a
Appendix D	43a
Appendix E	45a

TABLE OF AUTHORITIES

Cases:

Henderson v. *Bank of New England*, 986 F.2d 319 (9th Cir.), cert. denied, 114 S. Ct. 559 (1993)	10
Heno v. *FDIC*:	
996 F.2d 429 (1st Cir. 1993)	8
20 F.3d 1204 (1st Cir. 1994)	8, 9, 10
Land v. *Dollar*, 330 U.S. 731 (1947)	12
Larson v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949)	12
Lloyd v. *FDIC*, 22 F.3d 335 (1st Cir. 1994)	10
National Union Fire Ins. Co. v. *City Savings, F.S.B.*, Nos. 93-5587, 93-5595 & 93-5596 (3d Cir. July 1, 1994)	10
Office & Professional Employees Int'l Union, Local 2 v. *FDIC*, 962 F.2d 63 (D.C. Cir. 1992)	10
Praxis Properties, Inc. v. *Colonial Savings Bank, S.L.A.*, 947 F.2d 49 (3d Cir. 1991)	10
Rosa v. *RTC*, 938 F.2d 383 (3d Cir.), cert. denied, 112 S. Ct. 582 (1991)	6, 9-10
United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950)	12

Statutes: Page

Resolution Trust Corporation Completion Act, Pub. L. No. 103-204, § 27(a), 107 Stat. 2410 (1993) 2
12 U.S.C. 1441a(b) (Supp. IV 1992) 2
12 U.S.C. 1441a(b)(3)(A) (Supp. IV 1992) 2
12 U.S.C. 1441a(b)(4)(A) (Supp. IV 1992) 2
12 U.S.C. 1821(c)(1) (Supp. IV 1992) 2
12 U.S.C. 1821(d) (Supp. IV 1992) 2, 6, 7, 45a
12 U.S.C. 1821(d)(3)(B) (Supp. IV 1992) 2, 45a
12 U.S.C. 1821(d)(3)(B)(i) (Supp. IV 1992) 8, 45a
12 U.S.C. 1821(d)(3)(C) (Supp. IV 1992) 2, 46a
12 U.S.C. 1821(d)(3)-(8) (Supp. IV 1992) 2, 45a-57a
12 U.S.C. 1821(d)(3)-(13) (Supp. IV 1992) 2, 10
12 U.S.C. 1821(d)(5)(A)(i) (Supp. IV 1992) 3, 48a
12 U.S.C. 1821(d)(5)(C)(ii) (Supp. IV 1992) 2-3, 8, 50a
12 U.S.C. 1821(d)(5)(D)(i) (Supp. IV 1992) 3, 50a
12 U.S.C. 1821(d)(6) (Supp. IV 1992) 3, 52a
12 U.S.C. 1821(d)(6)(A) (Supp. IV 1992) 3, 52a
12 U.S.C. 1821(d)(7) (Supp. IV 1992) 3, 53a
12 U.S.C. 1821(d)(7)(A) (Supp. IV 1992) 3, 53a
12 U.S.C. 1821(d)(11)(B) (Supp. IV 1992) 8
12 U.S.C. 1821(d)(13) (Supp. IV 1992) 2, 57a
12 U.S.C. 1821(d)(13)(D) (Supp. IV 1992) 3, 4, 5, 6, 7, 9, 11, 58a
12 U.S.C. 1821(d)(13)(D)(ii) (Supp. IV 1992) 7, 8, 9, 59a
12 U.S.C. 1821(j) (Supp. IV 1992) 5
28 U.S.C. 1292(b) 5, 12

Miscellaneous:

Interim Statement of Policy Regarding Procedures To Be Used With Regard to Claims Based Upon Acts or Omissions of the Receiver, 59 Fed. Reg. 10,663 (1994) ... 9
Robert L. Stern et al., *Supreme Court Practice* (6th ed. 1986) 12

In the Supreme Court of the United States

OCTOBER TERM, 1994

No.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR MID KANSAS SAVINGS & LOAN ASSOCIATION AND FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, PETITIONER

v.

HOMELAND STORES, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Resolution Trust Corporation, as receiver for Mid Kansas Savings & Loan Association and First Federal Savings & Loan Association, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 17 F.3d 1269. The orders of the district court (App., *infra*, 15a-32a, 33a-42a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1994. A petition for rehearing was denied

on April 25, 1994. App., *infra*, 43a-44a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Paragraphs (3) through (8) and (13) of 12 U.S.C. 1821(d) (Supp. IV 1992) are set forth in the Appendix, *infra*, 45a-59a.

STATEMENT

1. The Resolution Trust Corporation (RTC) was formed under 12 U.S.C. 1441a(b) (Supp. IV 1992) and was granted, in Section 1441a(b)(4)(A), the "same powers and rights to carry out its duties with respect to [certain federally insured depository] institutions * * * as the Federal Deposit Insurance Corporation has under sections 1821, 1822, and 1823 of [Title 12]."[1] Section 1821(c)(1) authorizes the RTC to accept appointment and act as receiver for such institution.

Subsection (d) of Section 1821 establishes certain powers of the receiver. Paragraphs (3) through (13) of that subsection authorize the RTC to establish an administrative claims process to resolve claims against the receiver. Those provisions specify that the RTC shall give notice to certain creditors, by mail and publication, of a so-called "bar date" by which their claims must be filed. Section 1821(d)(3)(B) and (C). Section

---

[1] The grant of authority in Section 1441a(b)(4)(A) refers to institutions described in Section 1441a(b)(3)(A), which are institutions whose accounts were insured by the Federal Savings and Loan Insurance Corporation before August 9, 1989, for which a conservator or receiver was appointed after December 31, 1988, and before a date between January 1 and July 1, 1995, to be determined by the Chairman of the Thrift Depositor Protection Oversight Board. See Resolution Trust Corporation Completion Act, Pub. L. No. 103-204, § 27(a), 107 Stat. 2410 (1993) (amending 12 U.S.C. 1441a(b)(3)(A) (Supp. IV 1992)).

1821(d)(5)(C)(ii) allows an exception to the bar date for certain claims, provided that the claimant did not receive notice of the appointment of the receiver in time to file a claim and those claims are filed in time to permit payment from the estate

Once claims are filed, Section 1821(d)(5)(D)(i) provides that "[t]he receiver may disallow any portion of any claim * * * which is not proved to the satisfaction of the receiver," and Section 1821(d)(5)(A)(i) provides that the receiver "shall determine whether to allow or disallow [any] claim" within 180 days of the time the claim is filed with the receiver (unless the party consents to an extension of time). Paragraph (6) of Section 1821(d) provides that a claimant whose claim is not granted may bring a *de novo* action on the claim in the appropriate federal district court[2] or it may seek administrative review of the RTC's decision under Section 1821(d)(7).[3] In either case, the claimant must take action not more than 60 days after the earlier of the date the RTC disallows the claim or the expiration of the 180-day period described above. Section 1821(d)(6)(A).

This case involves the meaning of Paragraph (13)(D) of Section 1821(d), which, on its face, precludes judicial review of any claim before exhaustion of the claims procedure:

---

[2] The statute authorizes suit "in the district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia." Section 1821(d)(6)(A).

[3] If the RTC conducts an administrative review, its decision is "subject to judicial review under chapter 7 of title 5." Section 1821(d)(7)(A).

> Except as otherwise provided in this subsection [*i.e.*, Section 1821(d)], no court shall have jurisdiction over—
>
> > (i) any claim or action for payment from * * * the assets of any depository institution for which the Corporation has been appointed receiver * * *; or
> >
> > (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

2. Respondent Homeland is a tenant in the Belmont Square Shopping Center in Parsons, Kansas. Homeland's lease contained a clause—commonly referred to as a "key tenant" clause—requiring the continued presence in a specified area of the shopping center of a named tenant or of some "similar" tenant. Mid Kansas Savings & Loan Association and First Federal Savings & Loan Association acquired the shopping center. When those institutions failed, the RTC was appointed receiver and began to operate the center. After the existing key tenant and a successor vacated the key-tenant space, the RTC leased the space to Bob's Super Saver, Inc. See App., *infra*, 2a, 16a.

3. Without filing an administrative claim, Homeland filed this suit against the RTC as receiver in the United States District Court for the District of Kansas, alleging that the lease to Bob's Super Saver was a material breach of Homeland's lease. Homeland sought both monetary damages and injunctive relief. The RTC responded that the case should be dismissed without prejudice because Section 1821(d)(13)(D) deprived the

district court of jurisdiction without prior exhaustion of administrative remedies. See App., *infra*, 2a-3a, 16a-17a.[4]

The district court denied the RTC's motion to dismiss the case under Section 1821(d)(13)(D). App., *infra*, 24a-27a. The court acknowledged that in some circumstances "Congress intended that a district court would not have subject matter jurisdiction over a state law claim asserted against the RTC until such claim was presented to, and adjudicated by, the RTC." *Id.* at 24a. The court concluded that Homeland's "claim, however, does not fall within the statutory language," because the "claim is on the contract, not a creditor action." *Id.* at 25a. The court further explained:

> The statutory procedures apply to claims by creditors of the failed depository institution. Although the procedures are mandatory, [Homeland] obviously does not bring the claim as a creditor, as required by the statute. * * * [Homeland] claims breach of contract and the allegation is a contract claim for damages against the RTC as lessor, not against the failed institution. It is not a creditor action.

Ibid. (citation omitted).

In response to several motions for reconsideration filed by the various parties, the court issued a second opinion in December 1992, adhering to its earlier ruling on the jurisdictional question. App., *infra*, 36a-41a.

---

[4] The RTC also argued that Section 1821(j) barred the entry of injunctive relief. See App., *infra*, 3a. The district court agreed with the RTC's argument on that point. *Id.* at 17a-22a. The district court denied Homeland's motion to certify the injunctive relief question for review by the court of appeals, see *id.* at 3a, and the court of appeals declined to address the question, *id.* at 5a. Accordingly, that issue is not before this Court.

4. The district court certified its resolution of the jurisdictional question for interlocutory appeal under 28 U.S.C. 1292(b), and the court of appeals affirmed. App., *infra*, 1a-14a. That court acknowledged that the language of Section 1821(d)(13)(D) "appears very broad" (App., *infra*, 8a), but declined to apply it to dismiss the claim at issue here, based on its view of the "context and structure" (*id.* at 9a) of Section 1821(d) as a whole. Specifically, the court reasoned that "the 'claims' barred by § 1821(d)(13)(D) [should] parallel those contemplated under FIRREA's administrative claims process laid out in the greater part of § 1821(d)." App., *infra*, 9a-10a. Because the claims process requires that the RTC give notice to existing creditors that requires them to file claims by a specified date, the court reasoned that the process could not apply to "claims such as Homeland's arising after receivership and in the indeterminate future due to management actions of the RTC." *Id.* at 11a. The court concluded by "not[ing] that in reaching this conclusion we split with one of our sister circuits which has addressed a similar question." *Id.* at 14a (citing *Rosa* v. *RTC*, 938 F.2d 383 (3d Cir.), cert. denied, 112 S. Ct. 582 (1991)).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals in this case concerns an issue of great importance to the administration of the receivership system for failed federally insured depository institutions. The decision of the court of appeals is inconsistent with the plain meaning of the applicable statutory language and, as that court acknowledged, is in conflict with decisions in other courts of appeals. The decision exempts large classes of claims from the statutory administrative exhaustion requirement, applicable to more than 1600 receiverships

currently being administered by the Federal Deposit Insurance Corporation (FDIC) and the RTC. The practical importance of the question and the existence of a clear conflict warrant review by this Court.

1. As the court of appeals acknowledged (App., *infra*, 8a), Section 1821(d)(13)(D) uses "very broad" language to bar district court jurisdiction, prior to exhaustion of administrative remedies, over the claims that Section describes. 12 U.S.C. 1821(d)(13)(D) (Supp. IV 1992). Homeland seeks to recover monetary and non-monetary relief in this case based on its claim that its lease has been violated by the RTC's act, as receiver, of entering into the lease with Bob's Super Saver. Homeland's claim is one "for payment from * * * the assets of [a] depository institution for which the Corporation has been appointed receiver," as well as a "claim relating to a[n] act or omission of * * * the Corporation as receiver." It therefore falls within the "[l]imitation on judicial review" contained in Section 1821(d)(13)(D). The court of appeals nevertheless created an exception to that provision, allowing judicial consideration of a nonexhausted claim that "aris[es] after receivership" or is "due to management actions of the RTC." App., *infra*, 11a. That reading removes a class of cases from the statute that the text plainly includes and renders wholly superfluous the reference in Section 1821(d)(13)(D)(ii) to an "act or omission of * * * the Corporation as receiver" (since all such acts would have arisen after receivership).

The court of appeals rested its refusal to interpret Section 1821(d)(13)(D) as it is written on the premise that claims based on conduct of the receiver cannot be brought in the administrative claims process. App., *infra*, 9a-13a. That premise is incorrect. Nothing in the provisions of Section 1821(d) prevents the presentation of

claims based on the conduct of the receiver in the administrative claims process. The court of appeals based its conclusion that those post-receivership claims cannot be presented through the claims process entirely on its observation that the "bar date" provisions of Sections 1821(d)(3)(B)(i) and 1821(d)(5)(C)(ii) cannot sensibly apply to such claims. The court's conclusion is erroneous.

Section 1821(d)(3)(B)(i), the provision that requires claims to be filed by the bar date, expressly applies only to claims belonging to "the depository institution's creditors." That term seemingly identifies a narrower group than the parties who must exhaust the administrative claims procedure before invoking district court jurisdiction—those with "any claim" based on "any act or omission of such institution *or the Corporation as receiver*." Section 1821(d)(13)(D)(ii) (emphasis added).[5] Additionally, the First Circuit has held that Section 1821(d)(5)(C)(ii), which provides a specific exception to the bar date, allows the receiver to review post-receivership claims. See *Heno* v. *FDIC*, 20 F.3d 1204, 1209 (1994) (ruling that the FDIC's construction of the statutory bar-date exception was "a 'permissible' reading of an ambiguous provision viewed in the broader context of the statute as a whole").[6]

---

[5] For a similar distinction between creditors and claimants, see Section 1821(d)(11)(B) (referring to distribution of receivership assets to separate categories of "depositors, creditors, [and] other claimants").

[6] The court below relied on the original opinion of the panel in *Heno*, which was withdrawn and replaced by the opinion cited here. See App., *infra*, 12a (citing *Heno* v. *FDIC*, 996 F.2d 429 (1st Cir. 1993)).

It therefore makes no sense to conclude that only claims subject to the bar date can be brought through the administrative claims process. Both the FDIC and the RTC have concluded that the bar date does not apply to post-receivership claims that arise after the bar date, and they have further concluded that the receiver can evaluate such claims in the administrative claims process.[7] The court of appeals erred in adopting a more limited understanding of the receiver's power to entertain claims than that of the governmental agencies charged with administration of the statute.

2. The decision of the court below presents an important question warranting review by this Court at this time.

a. The decision below not only is incompatible with the plain language of Section 1821(d)(13)(D)(ii), but it also conflicts with decisions from other courts of appeals. As the court of appeals noted (App., *infra*, 14a), the notion that the exhaustion requirement of Section 1821(d)(13)(D) does not apply to "claims * * * arising after receivership" (App., *infra*, 11a) has been squarely rejected by the Third Circuit. *Rosa* v. *RTC*, 938 F.2d 383, 392-394 (rejecting argument that Section 1821(d)(13)(D) does not apply to claims that "arise out of * * * acts and omissions subsequent to RTC's initial intervention" and holding that claim seeking post-receivership contribution to pension plan was a claim for payment from the assets of the institution required to be presented initially through the administrative claims

---

[7] *Interim Statement of Policy Regarding Procedures To Be Used With Regard to Claims Based Upon Acts or Omissions of the Receiver*, 59 Fed. Reg. 10,663 (1994) (RTC procedures); *Heno* v. *FDIC*, 20 F.3d 1204, 1210-1214 (1st Cir. 1994) (reprinting relevant provisions of internal FDIC manual).

process), cert. denied, 112 S. Ct. 582 (1991). The Ninth Circuit has interpreted the relevant statutory provisions in the same manner. *Henderson* v. *Bank of New England*, 986 F.2d 319, 320 (action seeking release of credit information by receiver), cert. denied, 114 S. Ct. 559 (1993); see also *Office & Professional Employees Int'l Union, Local 2* v. *FDIC*, 962 F.2d 63, 67 (D.C. Cir. 1992) (per R. Ginsburg, J.) (in case challenging receiver's procedures for paying severance and vacation pay, court approves party's observation that the "very text [of Section 1821] appears to contemplate claims beyond those by creditors on the books to whom statutory notice must be sent") (internal quotation marks and ellipses omitted); *Lloyd* v. *FDIC*, 22 F.3d 335 (1st Cir. 1994) (action seeking reformation or cancellation of contract based on alleged misconduct of receiver); *National Union Fire Ins. Co.* v. *City Savings, F.S.B.*, Nos. 93-5587, 93-5595 & 93-5596 (3d Cir. July 1, 1994) (expressly rejecting the Tenth Circuit's interpretation of Sections 1821(d)(3)-(13)).

In addition, the premise of the court of appeals' analysis—that claims based on the receiver's operation of the institution cannot be presented through the administrative claims process—is in direct conflict with a recent decision of the First Circuit. See *Heno* v. *FDIC*, 20 F.3d 1204, 1209 (1994) (accepting FDIC's argument that it should have "an opportunity to evaluate post-bar date claims in the first instance" when the claims involved allege receivership misconduct). See also *Praxis Properties, Inc.* v. *Colonial Savings Bank, S.L.A.*, 947 F.2d 49, 63 (3d Cir. 1991) (dictum stating "a claimant must first comply with [Section 1821(d)(13)'s] statutory procedures as a prerequisite to federal jurisdiction, no matter when the claim arose"); *Henderson*, 986 F.2d at 321 (claim "to discover derogatory credit

information" is "susceptible of resolution through the claims procedure").

b. The breadth of the exhaustion requirement of Section 1821(d)(13)(D) is important to the efficiency of the process for disposing of the assets of failed financial institutions, because it permits the FDIC and the RTC to attempt to concentrate the resources of failed institutions on centralized administrative consideration of claims, instead of dissipating those resources in litigation. The obligation to submit to litigation of claims that have not been presented through the administrative claims process is costly and inefficient because it subjects the receiver to litigation before it has had an opportunity to determine in an orderly fashion whether it should allow the claim. The difficulties faced by the RTC and FDIC in swiftly taking control of the affairs of financial institutions are exacerbated by the chaotic conditions that are characteristic of institutions that are insolvent. An effective process requires that claimants present their specific claims directly to the receiver and that the receiver have an adequate opportunity to consider the claim prior to the institution of litigation. Because the RTC and the FDIC currently are involved in hundreds of receiverships in which that issue can arise, prompt clarification of the procedural and jurisdictional framework that governs claims against those receiverships is highly desirable.[8]

c. Finally, the interlocutory posture of this case does not negate the need for review at this time. In appropriate circumstances, the Court has granted petitions from interlocutory decisions in cases presenting questions "fundamental to the further conduct of the

---

[8] The RTC and the FDIC currently are serving as receiver for more than 1600 failed institutions.

case," *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947); see *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949) (same); Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 225 (6th ed. 1986) (citing cases and explaining that "where * * * there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status"). The question presented by this petition, which was certified and accepted below for interlocutory review under 28 U.S.C. 1292(b), involves the question whether the district court may entertain this claim prior to its presentation in the administrative process. There is no need to require the receiver to proceed through the full course of the litigation in the district court before considering the applicability of the statutory exhaustion requirement.[9]

---

[9] After the court of appeals issued its opinion and denied a petition for rehearing and suggestion for rehearing en banc, Homeland filed an administrative claim with the RTC, seeking $2,305,737.50 in damages. Homeland has suggested that the filing of that claim renders the case moot and precludes the RTC from seeking review by this Court. The case can become moot, however, only if Homeland agrees to dismiss its still-pending complaint that precipitated this dispute. If Homeland agrees to do so, we will inform the Court and may request that the Court "reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

PAUL BENDER
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

ELLEN B. KULKA
General Counsel

ANDREW E. TOMBACK
Deputy General Counsel

MARK P. HILEMAN
Acting Assistant General Counsel

MICHAEL P. CONDON
P. MATHEW SUTKO
Counsel
Resolution Trust Corporation

JULY 1994

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 93-3043

HOMELAND STORES, INC., PLAINTIFF-APPELLEE

vs.

RESOLUTION TRUST CORPORATION, DEFENDANT-APPELLANT

and

BOB'S SUPER SAVER, INC., DEFENDANT

Feb. 23, 1994

ORDER

Before: TACHA, GOODWIN* and BRORBY, Circuit Judges.

TACHA, Circuit Judge.

The district court found that it has jurisdiction to hear Homeland Stores' claims against the Resolution Trust Corporation ("RTC"). The court then certified for interlocutory appeal and the RTC now appeals the

---

* The Honorable Alfred T. Goodwin, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

district court's ruling. We exercise jurisdiction pursuant to 28 U.S.C. § 1292(b) and affirm.

I. Background

Mid Kansas Savings & Loan Association of Wichita, Kansas ("Mid Kansas"), and First Federal Savings & Loan Association of Coffeyville, Kansas ("First Federal"), succeeded to ownership of the Belmont Square Shopping Center ("Belmont Square") in Parsons, Kansas. Homeland Stores, Inc. ("Homeland") was assigned a lease in Belmont Square and operates a retail grocery store there.

In 1989, pursuant to 12 U.S.C. §§ 1464(d)(2) and 1441a(b), the RTC was appointed receiver for both First Federal and Mid Kansas. As part of this receivership, the RTC took over management of Belmont Square, a receivership asset.

Homeland's Belmont Square lease provides for the presence of an "anchor tenant" in a 40,000 square foot space in the shopping center. After the original anchor tenant, T.G. & Y., and a subsequent anchor tenant vacated that space, the RTC leased it to Bob's Super Saver, Inc. ("Bob's"). Homeland contends that RTC's execution of the lease to Bob's violates Homeland's lease which calls for the presence of T.G. & Y. or some other anchor tenant "similar" to T.G. & Y. and "acceptable" to Homeland. Homeland asserts that Bob's is neither a similar nor an acceptable anchor tenant because Bob's runs the same type of store as is run by Homeland itself.

Homeland filed suit against the RTC in the United States District Court for the District of Kansas alleging a material breach of its lease and seeking monetary damages and injunctive relief. Homeland also contends that the RTC has failed to maintain

adequately the Belmont Square parking lot and seeks monetary damages on this basis as well.

The RTC moved, under Fed. R. Civ. P. 12(b)(6), to dismiss Homeland's action for failure to state a claim upon which relief can be granted. The RTC argued that: (1) pursuant to 12 U.S.C. § 1821(j), the injunctive relief requested by Homeland is not available, and (2) pursuant to 12 U.S.C. § 1821(d)(13)(D), the district court does not have jurisdiction to hear Homeland's damages claims. In an October 13, 1992 order, the district court denied the RTC's motion. It found that because Homeland's claims are not creditor claims arising before Mid Kansas and First Federal entered receivership, but rather are claims arising from actions of the RTC in managing a receivership asset, they are not subject to the administrative claims process required under 12 U.S.C. §§ 1821(d)(3)-(13). As a result, the district court found that it has jurisdiction to hear Homeland's claims. With respect to the possibility of relief, the court found that, while 12 U.S.C. § 1821(j) prohibits injunctive relief against the RTC, relief in the form of monetary damages could be granted.

After denying the RTC's motion to reconsider, the district court certified its October 13, 1992 order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The court expressly declined Homeland's request to certify the specific question as to whether injunctive relief is available against the RTC, though the issue was discussed in its October 13, 1992 order. On February 23, 1993, we granted the RTC's petition to appeal the interlocutory order under 28 U.S.C. § 1292(b).

II. District Court's § 1292(b) Certification and Homeland's Motion to Raise Related Issue

We first address Homeland's motion that it be permitted in this interlocutory appeal to raise the issue of whether injunctive relief is available against the RTC. The motion is denied.

Our jurisdiction to hear this appeal arises pursuant to 28 U.S.C. § 1292(b). Under § 1292(b), a district court may certify for appeal an otherwise unappealable interlocutory order if the court determines that "such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.* In this case, the question of law the district court intended to certify is whether federal court jurisdiction over Homeland's claims against the RTC is barred under 12 U.S.C. § 1821(d)(13)(D). The district court, however, explicitly refused to certify the additional question of whether injunctive relief is available against the RTC, though the court discussed that issue in the same order in which it ruled on jurisdiction. Nevertheless, Homeland asks us to address the question of the availability of injunctive relief.

The district court certification requirement of § 1292(b) is to be taken seriously. It was not included in the original § 1292(b) legislation as proposed but specifically was added to the final version as a necessary screening mechanism for interlocutory appeals. 16 Charles A. Wright, et al., Federal Practice and Procedure § 3929, at 138 (1977). However, Homeland correctly points out that it is the district court order that is certified under § 1292(b) and not the specific question of law deemed controlling by the district

court. See *United States v. Stanley*, 483 U.S. 669 (1987). Homeland contends that, because the certified order discussed the question of injunctive relief along with the question of federal jurisdiction, we can and should address the injunctive relief issue in this appeal. We disagree.

If we find that a particular question other than the question specifically identified by the district court controls the disposition of the certified order, we may, and indeed should, address that question. *See id.; Ivy Club v. Edwards*, 943 F.2d 270, 275 (3d Cir. 1991), *cert. denied*, 112 S.Ct. 1282 (1992); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 400 (8th Cir.), *cert. denied*, 484 U.S. 917 (1987). In this case, however, whether injunctive relief is available against the RTC is not such an alternate controlling question. The order appealed from concerns whether Homeland's complaint states a claim upon which relief can be granted. Homeland's request for injunctive relief is only as a specific type of remedy for its breach of contract claims. Because we hold (in Section III below) that Homeland's complaint does state a claim and, at minimum, relief would be available in the form of damages at law, we need not decide on the availability of any specific type of alternate relief here. Thus, we do not address the question of the availability of injunctive relief.[1]

---

[1] One further preliminary issue requires our attention. On September 27, 1993, the RTC submitted a letter pursuant to Fed.R.App. P. 28(j) drawing the court's attention to *RTC v. Midwest Fed. Sav. Bank*, 4 F.3d 1490 (9th Cir. 1993), as supplemental authority. On September 29, 1993, Homeland submitted a response. The RTC moves to strike Homeland's response as argumentative and, therefore, prohibited under Rule 28(j). We agree with the RTC that Homeland's September 29, 1993 response, consisting of two single-spaced

III. District Court Jurisdiction Under FIRREA

We now come to the main issue in this case. The RTC contends that the district court erred in ruling that it has jurisdiction to hear Homeland's breach of contract claims and, therefore, in denying the RTC's 12(b)(6) motion to dismiss for failure to state a claim. Whether the district court has jurisdiction to consider Homeland's claims is a question of law which we review de novo. See *Cooper v. American Auto. Ins. Co.*, 978 F.2d 602, 611 n. 7 (10th Cir.1992); see also *Boone v. Carlsbad Bancorp.*, 972 F.2d 1545, 1551 (10th Cir.1992) (stating that, as a general matter, we review de novo an order regarding a motion to dismiss for failure to state a claim).

We are presented here with a question of first impression in this circuit: does 12 U.S.C. § 1821(d)(13)(D) bar federal district courts from considering claims such as Homeland's, which arise due to RTC action in managing an institutional asset after an institution enters receivership, pending exhaustion of administrative process provided for under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), codified in relevant part at 12 U.S.C. §§ 1821(d)(3)-(13).

The RTC suggests that our decision in *RTC v. Mustang Partners*, 946 F.2d 103 (10th Cir.1991) controls. However, while we held in *Mustang*

---

pages of narrative, is argumentative. We therefore grant the RTC's motion to strike it. However, we reject the RTC's suggestion that we sanction Homeland for acting in bad faith, especially in light of the fact that, under a strict definition of what constitutes argumentation, the RTC's original September 27, 1993 submission is also somewhat argumentative, thereby provoking a response. We note additionally that, despite granting the RTC's motion here, we are capable of reading and analyzing on our own the supplemental case involved.

Partners that administrative exhaustion was required for district court jurisdiction, the case involved a creditor claim that arose before the depository institution entered receivership. *See id.* at 106 ("No interpretation [of FIRREA] is possible which would excuse [the administrative claims] requirement for creditors with suits pending. . . ."). Similarly, most of the other cases cited by the RTC for the proposition that administrative exhaustion is required involve claims arising before an institution entered receivership rather than from the actions of the RTC in managing an institution's assets after receivership, as is the case here. *See, e.g., Capitol Leasing Co. v. FDIC*, 999 F.2d 188 (7th Cir.1993); *Office & Professional Employees Int'l Union, Local 2 v. FDIC*, 962 F.2d 63 (D.C.Cir.1992); *Meliezer v. RTC*, 952 F.2d 879, 881 (5th Cir.1992); *RTC v. Elman*, 949 F.2d 624, 627 (2d Cir.1991); *FDIC v. Shain, Schaffer & Rafanello*, 944 F.2d 129, 136 (3d Cir.1991). We therefore return to the statute to answer the somewhat different question presented in this case.[2]

FIRREA, at 12 U.S.C. § 1821(d)(13)(D), contains language barring federal court jurisdiction over certain claims against the RTC as receiver for failed financial institutions pending the exhaustion of administrative process outlined in the same subsection (§ 1821(d)). Section 1821(d)(13)(D) reads:

---

[2] We acknowledge that one of our sister circuits has in fact required administrative exhaustion for a claim which arose after a depository institution entered receivership. *See Rosa v. RTC*, 938 F.2d 383 (3d. Cir.1991). Though this factor weighs in our decision today, we look primarily to the language of the statute in making our determination.

(D) Limitation on judicial review

> Except as otherwise provided in this subsection [i.e., after administrative process is pursued sufficiently under 12 U.S.C. § 1821(d)(6)(A)], no court shall have jurisdiction over—
>
> > (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the [RTC] has been appointed receiver, including assets which the [RTC] may acquire from itself as such receiver; or
> >
> > (ii) any claim relating to any act or omission of such institution or the [RTC] as receiver.

12 U.S.C. § 1821(d)(13)(D). Standing alone, this language appears very broad. The RTC argues that it is broad enough to encompass, and therefore to bar, the claims at issue here.[3] We disagree.

We begin with the established principle of statutory construction that, if possible, "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." *FDIC v. Canfield*, 967 F.2d 443, 447 (10th Cir.) (citation omitted), *cert. dismissed*, 113 S.Ct. 516, (1992); *see also Kenneth v. Schmoll*, 482 F.2d 90, 93 (10th Cir.1973). The RTC asserts that to find that the district court has jurisdiction over the claims at issue here would violate the above principle by reading § 1821(d)(13)(D) out of FIRREA for purposes of this case.

Were we to read § 1821(d)(13)(D) in a vacuum we might agree. However, we do not determine in a

---

[3] It is undisputed in this case that Homeland did not pursue its claims through administrative process.

vacuum which "claims" are jurisdictionally barred under this subsection. In interpreting a statutory provision, "context and structure are, as in examining any legal instrument, of substantial import in the interpretive exercise." *American Mining Congress v. EPA*, 824 F.2d 1177, 1185 (D.C.Cir.1987) (citing *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 18-19 (1981); *Stafford v. Briggs*, 444 U.S. 527, 535 (1980)); *see Aulston v. United States*, 915 F.2d 584, 589 (10th Cir.1990) ("In interpreting . . . relevant language . . . we look to the provisions of the whole law. . . ."), *cert. denied*, 111 S. Ct. 2011 (1991) (citing *Dole v. United Steelworkers of America*, 494 U.S. 26, 35, 108 L. Ed. 2d 23, 110 S. Ct. 929 (1990)); *see also Johnson v. Home State Bank*, 111 S. Ct. 2150, 2153, (1991) (stating that whether a surviving mortgage interest gives rise to a claim "subject to inclusion in a Chapter 13 reorganization plan is a straightforward issue of statutory construction to be resolved by reference to 'the text, history, and purpose' of the Bankruptcy Code"). In this vein we note that § 1821(d)(13)(D) as quoted above is one part of an integrated administrative claims process under FIRREA outlined in § 1821(d)(3)-(13). In fact, the jurisdictional ban in § 1821(d)(13)(D) is expressly tied to the remainder of the administrative claims process. It holds that no court shall have jurisdiction over claims "except as otherwise provided in [subsection 1821(d)]." § 1821(d)(13)(D). Jurisdiction is "otherwise provided" for in subsection 1821(d) only for those "claims" which fit under the greater administrative process outlined therein. *See* § 1821(d)(6)(A). As a practical matter of statutory construction, then, we proceed on the assumption that Congress intended the "claims" barred by

§ 1821(d)(13)(D) to parallel those contemplated under FIRREA's administrative claims process laid out in the greater part of § 1821(d).

In examining the whole of this process it is evident that the term "claim" as used in § 1821(d)(13)(D) should be interpreted to exclude claims such as Homeland's arising from management actions of the RTC after taking over a depository institution. As the district court and Homeland suggest, much of § 1821(d) indicates that in requiring administrative review—and in the meantime forbidding federal court jurisdiction—of "claims," Congress had in mind creditor and related claims arising before an institution enters receivership. Most importantly, § 1821(d)(3)(B) requires that, after taking over as receiver, the RTC give notice to creditors who then have a limited amount of time (not less than 90 days) to present their claims to the RTC.[4] Claims not filed within the prescribed time limit are to be disallowed with such disallowance being final. *See* § 1821(d)(5)(C) (directing that the RTC disallow any

---

[4] In its entirety, § 1821(d)(3)(B) reads:

> The receiver, in any case involving the liquidation or winding up of the affairs of a closed depository institution, shall—
>
> (i) promptly publish a notice to the depository institution's creditors to present their claims, together with proof, to the receiver by a date specified in the notice which shall be not less than 90 days after the publication of such notice; and
>
> (ii) republish such notice approximately 1 month and 2 months, respectively, after the publication under clause (i).

claims not filed before the deadline established under § 1821(d)(3)(B), except in very limited circumstances). Obviously, claims such as Homeland's arising after receivership and in the indeterminate future due to management actions of the RTC cannot have been contemplated when such deadlines for filing administrative claims were set. Put another way, by the plain language of the statute, FIRREA's administrative process is closed to Homeland for purposes of the claims at issue in this case.[5]

The claims filing deadlines of § 1821(d)(3)(B) have already led several courts to hold that the jurisdictional ban of § 1821(d)(13)(D) is inapplicable in certain circumstances. For example, in *RTC v.*

---

[5] Though the RTC asserts that it will hear all administrative claims, including Homeland's claims in this case, we must first look to the plain language of the statute as we have done here.

This plain language also highlights the need for parallel construction of the statute. Because Homeland's claims are not "claims" contemplated under the administrative process, were we nonetheless to find these claims included in the jurisdictional bar of § 1821(d)(13)(D), Homeland would have neither an administrative nor a judicial forum for the claims. Such an outcome raises constitutional problems. In *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 (1989), the Supreme Court noted that an interpretation of former FSLIC statutory claims procedures which did not allow for de novo review by federal courts after a defined, reasonable period of time raised "serious constitutional difficulties." *Id. at* 579. In this case the outcome would be that much more problematic because Homeland would not only be denied timely judicial review, but all review. Further, such an outcome is not consistent with the intent of Congress in formulating the FIRREA claims process. *See* H.R. Rep. No. 54, 101st Cong., 1st Sess., pt. 1 at 418 (1989) (indicating that, in setting up the FIRREA claims process, Congress intended to be responsive to the constitutional concerns raised by the Supreme Court in *Coit*).

Midwest Fed. Sav. Bank, 4 F.3d 1490 (9th Cir.1993), the Ninth Circuit held that, even though the defendant has not exhausted the administrative procedures established by FIRREA, § 1821(d)(13)(D) does not divest a district court of jurisdiction where an affirmative defense is presented in response to an RTC claim. The court said:

> [T]he court's consideration of subsection d of Section 1821 in its entirety leads the court to conclude that even if the plain language of § 1821(d)(13)(D) were read or understood to include affirmative defenses, an exception to the plain meaning rule of statutory construction would apply because such a literal application of the statute would produce a result demonstrably at odds with the intention of the drafters evidenced in the remainder of Section 1821(d), and would lead to the 'patently absurd consequence' of requiring presentment and proof to the RTC of all potential affirmative defenses that might be asserted in response to unknown and unasserted claims or actions by the RTC.

Id. at 1497 (quoting *RTC v. Conner*, 817 F.Supp. 98, 102 (W.D.Okla.1993)). In *Heno v. FDIC*, 996 F.2d 429 (1st Cir.1993), the First Circuit, though in the context of a § 1821(e) contract repudiation by the RTC, suggests an analysis similar to the Ninth Circuit's.[6] The court found that "unless Heno's claim is 'against the assets' of the Bank, rather than

---

[6] We do not decide the case at bar under the framework of § 1821(e) because that section is relevant only where the RTC expressly repudiates a contract. Neither party contends that the RTC exercised its § 1821(e) repudiation power. Rather, the issue on the merits presumably would be whether the RTC indeed violated the Homeland lease.

against the FDIC, it need not (indeed could not) have been filed prior to the . . . bar date [established pursuant to § 1821(d)(3)(B)] since the FDIC did not repudiate the Bank's agreement with Heno until almost six months after the bar date." *Id.* at 433-34 (emphasis added). This reasoning is equally applicable to claims such as Homeland's that arise from management actions of the RTC after a depository institution enters receivership.

Significant portions of the remainder of § 1821(d) also suggest that "claims," as used therein, does not include claims such as Homeland's. For example, § 1821(d)(10)(A), discussing the payment of claims found to be valid in the administrative process, mentions only "creditor claims." Additionally, the statute outlines claim preferences putting the claims process in the context of a conventional winding up of the debts accrued by an institution before entering receivership. *See* 12 U.S.C. § 1821(d)(8)(A) (discussing preferences for claims involving security interests); 12 U.S.C. § 1821(d)(11) (discussing distribution of assets in general and in particular the payment of depositor claims and the distribution of remaining amounts to shareholders). Finally, throughout § 1821(d) the RTC is referred to primarily in its capacity as receiver. *See*, e.g., § 1821(d)(13)(D) (barring court jurisdiction over "any claim relating to any act or omission of such institution or the [RTC] as receiver") (emphasis added). This is significant because § 1821(d)(2) defines the RTC's duties as conservator and as receiver differently. As "conservator," the RTC may "take such action as may be—(i) necessary to put the insured depository institution in a sound and solvent condition; and (ii) appropriate to carry on the business of the institution and preserve and conserve

the assets and property of the institution." § 1821(d)(2)(D). By contrast, as "receiver," the RTC may "place the insured depository institution in liquidation and proceed to realize upon the assets of the institution, having due regard to the conditions of credit in the locality." § 1821(d)(2)(E). Though the lines between the two functions may blur at times, the management actions taken by the RTC giving rise to Homeland's claims fall more squarely under the RTC's powers as "conservator." That the RTC is referred to in § 1821(d) primarily in its capacity as "receiver" suggests that Homeland's actions are not covered by the jurisdictional bar therein.

None of these factors standing alone necessarily dictate the outcome we reach today. However, taken together and especially in light of the time bar established in §§ 1821(d)(3)(B) and (d)(5)(C), they lead us to the conclusion we reach here. We note that in reaching this conclusion we split with one of our sister circuits which has addressed a similar question. *See Rosa v. RTC*, 938 F.2d 383, 392 (3d Cir.) (holding that FIRREA's jurisdictional bar does encompass a claim arising from post receivership actions of the RTC), *cert. denied*, 112 S.Ct. 582 (1991). We believe that our reading of the statute more accurately reflects its language as a whole.

V. Conclusion

In sum, we find that the language of 12 U.S.C. § 1821(d) dictates that the term "claim" as used in subsection § 1821(d)(13)(D) does not include Homeland's claims against the RTC in this case. As a result, the district court has jurisdiction to hear these claims without first requiring any administrative process. The district court's order denying the RTC's motion to dismiss is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 91-1304-K

HOMELAND STORES, INC., PLAINTIFF

vs.

RESOLUTION TRUST CORPORATION;
AND BOB'S SUPER SAVER, INC., DEFENDANTS

[Filed Oct. 13, 1992]

MEMORANDUM AND ORDER

The present case concerns four separate claims: (1) a breach of contract claim resulting from the Resolution Trust Corporation's leasing of space in the shopping center over which it is the receiver; (2) a damages claim against the Resolution Trust Corporation for failing to repair and maintain the parking lot of the shopping center; (3) a request to joint Bob's Super Saver as a necessary defendant for injunctive relief in the breach of contract claim; and (4) a claim for tortious interference with contract against Bob's Super Saver, the lessee of the mall space. Defendants have both moved to dismiss the claims.

Safeway Stores leased space in Belmont Square Shopping Center, and Homeland Stores became the assignee of Safeway's lease. The shopping center was mortgaged to two savings and loan associations, which foreclosed their interests and became insolvent. Resolution Trust Corporation (RTC) succeeded to those interests and became the lessor in the Homeland lease.

Paragraph 2 of the Homeland lease provides for a minimum rent and an additional percentage rent in the amount by which 1% of the Homeland/lessee's gross sales exceed the minimum rent.

Paragraph 20 of the Homeland lease discusses the anchor tenant, T. G. & Y. In the event that the anchor tenant's lease is canceled, the lessee/Homeland's obligation to pay minimum rent is suspended until there is a "similar tenant acceptable to lessee for the same space in the shopping mall." (Homeland argues that this means it approves the tenant or RTC is in breach of the contract. RTC argues that this means Homeland does not have to pay rent if it does not approve of the new tenant.) In the event that a substitute tenant is not found within 189 days, ¶20 states that the lessee may cancel its lease.

The T. G. & Y. lease was canceled and a second substitute tenant also vacated the premises. Defendant/Bob's Super Saver executed a lease agreement with RTC for the space originally occupied by T. G. & Y.

Homeland's initial complaint claimed a breach of the real estate lease by RTC and sought injunctive relief. Bob's was joined as a necessary party to the claim for injunctive relief. Bob's filed a motion to dismiss. RTC filed a motion to dismiss as well.

Homeland's amended complaint further alleged tortious interference with Homeland's lease contract by Bob's. Bob's filed a second motion to dismiss.

Homeland also alleged a damage claim against RTC for failing to repair and maintain the shopping center parking lot. (An earlier damage claim for unjust enrichment for rent paid the insolvent savings and loans was withdrawn.) The parking lot damage claim arises out of RTC's conduct months after it was appointed receiver. RTC moved to dismiss.

Fed.R.Civ.P. 12(b)(6) permits a federal court to dismiss a complaint if it fails to state a claim upon which relief could be granted. Under Fed.R.Civ.P. 12(b)(6), a district court must evaluate the proffered legal theory on the assumption that the factual allegations, however fantastic, are true. *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

1. *RTC's Motion to Dismiss the Breach of Contract Claim*

Plaintiff alleged that defendant/RTC materially breached the Homeland lease by leasing to defendant/Bob's in violation of ¶20 of the Homeland lease and in violation of good faith implicit in all contracts. Although not moving for an injunction, plaintiff requested injunctive relief. Defendant/RTC moved for dismissal (12(b)(6)) of plaintiff's request for an injunction claiming that injunctive relief must be denied as a matter of law under 12 U.S.C. §1821. Although the issue before the court is whether the breach of contract claim can withstand the motion to dismiss, both parties have fully briefed the issue of injunctive relief, and this court will discuss the applicability of injunctive relief to the RTC's actions in this case.

12 U.S.C. §1821(j) states:

> Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.

This statute applies to RTC by virtue of 12 U.S.C. §1441a(b)(4)(A) (giving RTC the same powers that the FDIC has under 12 U.S.C. §1821). Although RTC does not have unlimited rights under the statute, the question in this case concerns whether or not RTC's execution of a lease for the business premises falls under the "powers and functions" it has in the role of receiver. If executing the lease is within the receiver's powers or functions as receiver, then that action cannot be restrained by an injunction.

The statute continues by stating that as receiver, the RTC may "perform all functions of the institution in the name of the institution which is consistent with the appointment as conservator or receiver; and preserve and conserve the assets and property of such institution." 12 U.S.C. §1821(d)(2)(B)(iii), (iv). The RTC's powers are broad. *Rosa* v. *RTC*, 938 F.2d 383, 398 (3d Cir. 1991). Federal courts can only restrain the RTC when it is acting clearly outside its statutory powers. *Coit Indep. Joint Venture v. FSLIC*, 489 U.S. 561, 572-73 (1989).

The leasing of the property is the means by which RTC could preserve the assets of the failed savings and loan that owned the shopping mall as well as preserve the property of the failed institution. Under FIRREA, Congress gave the RTC the "power to take all actions necessary to resolve the problems posed by

a financial institution in default." *Gross v. RTC*, 1992 U.S.App. Lexis 21064 (3d Cir. 1992). By leasing the space to Bob's Super Saver, RTC was attempting to preserve the assets of the S&L.

Plaintiff cites *Cummings Properties Mgt. v. FDIC*, 786 F.Supp. 144 (D. Mass. 1992), as support for its argument that the receiver can be enjoined when its actions violate a contract over which it is receiver. This court finds that the *Cummings* decision is fact specific and therefore does not disturb the legal foundation for this court's decision. *Cummings* concerns a receiver whose actions are not found to be within the powers or functions statutorily granted to it. It is not that the breaking of any lease is outside the powers of the receiver, but instead, that the breaking of the lease by removing an ATM machine from the bank premises is outside the powers of the receiver. Removing the ATM machine was not found to be part of preserving the assets of the failed institution. In the case before this court, however, leasing of the premises does preserve the assets of the failed savings and loan and therefore does fall under the statutorily defined powers and functions of the receiver.

Furthermore, defendant/RTC argues that leasing the property is transferring an asset, the possessory interest in the property, to the new tenant and thereby maximizing the value of the shopping mall for creditors of the failed savings and loan. The power to transfer assets is found in 12 U.S.C. § 1821(d)(2)(G)(i)(II). Plaintiff would read this as only applying to transfers to other depository institutions, but the clear language of the statute allows for any type of transfer of assets. Only for a transfer to another depository institution does the receiver need approval by the appropriate federal banking agency.

SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1100 n.7 (10th Cir. 1991). Given this reasoning, and the language of the statute, plaintiff's request for injunctive relief should be denied.

Plaintiff claims that 12 U.S.C. §1821(j) is narrower than defendant contends—that it only applies to actions surrounding the appointment of the receiver, and as such the statute does not prevent plaintiff's claim. To support this claim plaintiff argues that the statute derived from another anti-injunctive statute, 12 U.S.C. §1446, and that this statute was designed to prevent collateral attacks on the appointment of the receiver. Plaintiff cites the Supreme Court in *Coit* to show how this other statute has narrow application. Plaintiff reads *Coit* as holding that the district court has jurisdiction over injunctive claims and that the statutory context of §1821(j) only prevents enjoining the RTC's actions when such actions pertain to its appointment as receiver.

The Court in *Coit*, however, held that although the anti-injunctive statute prevented claims "attempting to restrain the receiver from carrying out its basic functions . . . [the statute] should not be read to prevent de novo court adjudication of the validity of creditors' claims against savings and loans in receivership." *Coit*, 489 U.S. at 575. The Court held this because a suit establishing the amount of a claim "did not interfere with or restrain the receiver's possession of the insolvent's assets or its exclusive control over the assets." *Id.* The Court, however, held that the statute prevented injunctions interfering with the receiver's powers or functions, even though it did not apply to claims against the debtor institution in receivership. Thus, plaintiff could bring a claim against the savings and loans that are the debtor institutions in the present case, but

cannot bring an injunctive action against RTC if the RTC is acting within its statutory powers or functions. The *Coit* Court disagreed with the reasoning of *North Mississippi Savings & Loan Ass'n v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), because the court there had held that a court's adjudication of claims against a debtor institution was a restraint on the receiver's powers. Therefore, the *Coit* Court held that enjoining a receiver from exercising powers not statutorily included in its "powers and functions" did not violate the anti-injunction statute. Because a receiver does not have the power to adjudicate creditors' claims against the assets, the *Coit* Court held there was jurisdiction in the district court.

In the case before this court, the issue concerns RTC's actions as receiver and the claim is against it in its capacity as receiver, not against the failed savings and loan. Therefore, the holding of *Coit* does not prevent §1821(j) from denying injunctive relief if the court finds that leasing the space is within the receiver's powers or functions as receiver.

In *Rosa v. RTC*, the Third Circuit held that the anti-injunction statute's purpose is to permit the RTC, as receiver, to function without judicial interference that would restrain the exercise of its powers. If the remedy sought restrains or affects the exercise of the receiver's powers or functions, the remedy will be denied on statutory grounds. Claims can be brought against a receiver, but the statute is explicit in denying any actions by courts that restrain the receiver in its powers. Thus, a claim against the receiver need not restrain it, but an injunction against it does. Although injunctive relief cannot be granted both because of the statutory proscription and because of plaintiff's failure to

properly move for injunctive relief, nothing prevents plaintiff from submitting the breach of contract claim with a request for damages or other types of relief. In its first amended complaint, plaintiff did allege both a damages claim for rents paid by Homeland for the months in which the space was not rented by a lessee similar to T. G. & Y. and a claim for any other relief the court may determine. The first of these claims, the unjust enrichment due to rents, plaintiff dropped. (Homeland's response brief, n. 36.). Plaintiff does, however, still leave open the door to a damages claim by not dropping the request for any other relief the court may determine. Thus, even though the injunctive relief requested is not available, damages due to breach of contract could still be available. Therefore, if the breach of contract claim survives a 12(b)(6) motion, the claim should not be dismissed for asking for relief that the statute denies. *Holt Civic Club v. City of Tuscaloosa*, 438 U.S. 60 (1978) (the fact that the requested relief is inappropriate should not determine the outcome of a motion to dismiss). In fact, the four circuits that have addressed the §1821(j) issue have held that a plaintiff is limited to a damages claim against the RTC when the RTC is acting within its statutory powers. *Telematics Internat'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703 (1st Cir. 1992); *Joint Venture v. Onion*, 938 F.2d 35 (5th Cir. 1991); *Rosa v. RTC*, 938 F.2d 383; *Automated Business Systems v. FDIC*, 1990 U.S.App. Lexis 23401 (4th Cir. 1990).

The next question before this court is whether or not plaintiff's breach of contract claim due to RTC's leasing to Bob's violates ¶20 of the Homeland lease and the implicit good faith dealing of all contracts. The court must assume the allegations of plaintiff are true for purposes of the motion.

Plaintiff's brief of contract claim involves two allegations: (1) RTC has violated ¶20 of the lease agreement; and (2) RTC has breached the duties of good faith and fair dealing which are implicit obligations arising from reading the contract as a whole.

Paragraph 20 states that if the lease with T. G. & Y. is canceled, then plaintiff/lessee's obligation to pay minimum rent is suspended until lessor has found an acceptable renter. The lease does not state that any renter must be approved by lessee/plaintiff, only that if lessee/plaintiff does not approve, lessee may cancel the lease within 180 days. Paragraph 14, which was an anti-competition clause, was struck from the lease. Thus, RTC's leasing of the space to Bob's does not violate ¶20 because it was under no obligation to get prior approval from Homeland.

Plaintiff/lessee also argues that RTC has breached the good faith implicit in all contracts. Good faith concerns the proper execution of the terms of a contract. Good faith does not allow a party to insert provisions into a contract not originally included. Thus, good faith does not imply an anti-competition clause. Plaintiff, however, claims that the new lease worked to the detriment of Homeland and violates implicit fair dealing provisions found in all contracts—that is, that one party should not try to destroy what both parties have contracted for.

Under Kansas law, every contract implies good faith and fair dealing between the parties. *Bonanza, Inc. v. McLean*, 242 Kan. 209 (1987). Neither party may intentionally or purposefully do anything to destroy or injure the other party's rights under the contract. *Id.* Paragraph 2 of the contract, the percentage rent agreement, determines rent above a minimum figure based on the gross sales of the

lessee. Plaintiff argues that this shows a mutual agreement of the parties to work for the economic well-being of Homeland. Plaintiff alleges that the new lease with Bob's effectively works to deny the possibility of economic prosperity on the part of Homeland, and that RTC did this intentionally to put Homeland out of business. Thus, assuming plaintiff's factual allegations are true for purposes of this motion, plaintiff states a cause of action for breach of contract and the motion to dismiss should therefore be denied.

Defendant/RTC alleges that even if a breach of contract claim can be substantiated, the claim should be dismissed because plaintiff failed to follow mandatory procedures. Section 1821(d) provides for de novo district court jurisdiction only after the filing of a claim with, and the initial processing of that claim by, RTC pursuant to §1821(d)(5) and (6)(A). *Rosa*, 938 F.2d at 392. Congress intended that a district court would not have subject matter jurisdiction over a state law claim asserted against the RTC until such claim was presented to, and adjudicated by, the RTC. *Circle Industries v. City Federal Savings Bank*, 749 F.Supp. 447, 454 (E.D.N.Y. 1990) (citing 12 U.S.C. §1821(d)(5) & (d)(13)(D)); *Tuxedo Beach Club Corp. v. City of Federal Savings Bank*, 737 F.Supp. 18 (D.N.J. 1990). In the case before this court, plaintiff failed to follow these procedures. The statute does not create exceptions to adherence to procedures; no court has the power to adjudicate claims except in accordance with the procedures. *Capital Data Corp. v. Capital Nat'l Bank*, 778 F. Supp. 669, 675 n.5 (S.D.N.Y. 1990); *Parker North American v. RTC*, 131 B.R. 452, 456 (Bankr. C.D. Cal. 1991).

In response, plaintiff argues that because defendant failed to mail the statutorily mandated notice, plaintiff did not have to comply with the procedures. Plaintiff argues that the procedures were not mandatory because defendant failed to mail notice as required by statute, and without such notice plaintiff did not have to fulfill the other requirements. The statute requires that the receiver mail a notice to the creditor to initiate the claims process. §1821(d)(3)(C). The Fifth Circuit, however, has held that the two requirements are independent. The RTC does not waive the exhaustion of the statutory procedures merely by failing to mail notice of plaintiff's rights. *Meliezer v. RTC*, 952 F.2d 879, 883 (5th Cir. 1992). Thus, plaintiff would have to follow these procedures if its claim fell under the statute. Failure to exhaust these procedures results in a claim being barred.

Plaintiff's claim, however, does not fall within the statutory language. Plaintiff's claim is on the contract, not a creditor action. This fact is dispositive of this issue. The statutory procedures apply to claims by creditors of the failed depository institution. 12 U.S.C. §1821(d)(3)(B), (C). Although the procedures are mandatory, plaintiff obviously does not bring the claim as a creditor, as required by the statute. In this case, the RTC has assumed the contract and has stepped into the shoes of the lessor. Plaintiff claims breach of contract and the allegation is a contract claim for damages against RTC as lessor, not against the failed institution. It is not a creditor action. Thus, any claim of dismissal based on failure to follow procedure should be denied. Plaintiff's breach of contract claim against RTC has been properly alleged and therefore withstands defendant/RTC's motion to dismiss.

2. *RTC's Motion to Dismiss Damages Claim for Failure to Maintain Parking Lot*

Plaintiff has also brought a claim for damages based on breach of ¶4 of the lease agreement. Plaintiff alleges that maintenance of the parking lot is part of the lease and RTC, as the lessor, failed to take care of the lot. Defendant, however, claims that plaintiff failed to exhaust the statutory claims procedure required by 12 U.S.C. §1821(d)(3)-(13) and thus is barred from bringing this claim.

As this court set forth above, §1821(d) provides for de novo district court jurisdiction only after the filing of a claim with, and the initial processing of that claim by, RTC pursuant to §1821(d)(5) and (6)(A). *Rosa*, 938 F.2d at 392. Congress intended that a district court would not have subject matter jurisdiction over a state law claim asserted against the RTC until such claim was presented to, and adjudicated by, the RTC. *Circle Industries*, 794 F.Supp. at 454 (citing 12 U.S.C. §1821(d)(5) & (d)(13)(D)); *Tuxedo Beach Club Corp.*, 737 F. Supp. 18.

In this case, plaintiff failed to follow these procedures. Plaintiff again argues that because defendant failed to mail the statutorily mandated notice, that it did not have to comply with the procedures. Relying again on the Fifth Circuit, this court finds that the two requirements are independent. The RTC does not waive the exhaustion of the statutory procedures merely by failing to mail notice of plaintiff's rights. *Meliezer*, 952 F.2d at 883. Thus, if plaintiff's claim for damages was covered by the statute, plaintiff would be required to fulfill the procedural obligations of proper filing. Failing to exhaust these procedures would bar a claim.

But as in plaintiff's breach of contract claim, the damages claim is also on the contract, not a creditor action. Although the procedures are mandatory, plaintiff does not bring the claim as a creditor. It is a contract claim for damages against RTC as lessor, not a creditor action. Plaintiff alleges failure to maintain a parking lot, a claim that arose after RTC assumed the contract, and it is against RTC on the contract not as a creditor of the S&L. Thus, any motion to dismiss this claim because of failing to follow procedure will be denied.

3. *Bob's Motion to Dismiss Breach of Contract Claim*

Bob's Super Saver's first motion to dismiss was in response to plaintiff's claim of breach of the real estate lease and request for injunctive relief against RTC. Plaintiff joined Bob's as a necessary party for injunctive relief. Plaintiff later brought a claim against Bob's for tortious interference with the lease contract. Bob's filed a motion to dismiss this claim as well.

Plaintiff admits that the propriety of making Bob's a party does not raise the issue of whether or not the requirements for a preliminary injunction have been alleged. It is, instead, whether Bob's is a proper party. Plaintiff also admits that it has not moved for an injunction, but is only asking for injunctive relief against Bob's due to breach of the Homeland lease by RTC. Both parties, however, have briefed whether or not a preliminary injunction should be granted.

Plaintiff does state that Bob's was a "knowing participant" in RTC's breach of the Homeland lease, and this court should assume that the claim at issue is whether or not Bob's breached the Homeland lease.

Thus, this court must decide two issues here: (1) whether or not the claim of breach of contract by Bob's can be supported; and if so, (2) whether or not this court can grant the injunctive relief requested.

A. Breach of Homeland contract.

For the reasons stated above concerning this claim against RTC, assuming all facts as plaintiff states them, plaintiff can survive a dismissal motion for breach against its lessor. The question is whether a lessee can be held liable for breach of contract against another lessee.

A contract suit is based on the privity of the parties. One cannot sue someone in contract unless that person was a party to the contract. Plaintiff's claim of knowing participation is not enough to make out a cause of action in contract. Again, plaintiff did not move for an injunction and so that is not before the court. Injunction was merely the relief sought. If plaintiff had stated an actionable claim, the next step would have been to determine whether it was a claim on which injunctive relief could be sought. But plaintiff has not stated an actionable claim. The allegation of knowing participation by defendant goes to plaintiff's claim of tortious interference, but that is not an issue in this first motion. Because a breach of contract claim against Bob's cannot be made out, defendant's motion to dismiss the breach of contract claim against it should be granted.

B. Injunctive relief requested.

Plaintiff's request for injunctive relief is not a viable issue before the court with the breach of contract claim because plaintiff failed to make out a

cause of action against defendant. Plaintiff has not moved for an injunction but merely claims it as its requested relief. Plaintiff seems to suggest that injunctive relief against Bob's might be proper to prevent irreparable injury. Because no breach of contract claim can be made out against Bob's, the element of success on the merits, which is needed to get a preliminary injunction, cannot be satisfied. Thus, given that no breach of contract claim can be made against Bob's, whether any injunctive relief is possible depends upon whether the claim of tortious interference against Bob's is viable.

4. *Bob's Motion to Dismiss Tortious Interference Claim*

Defendant/Bob's has also moved to dismiss the claim of tortious interference with contract. Kansas law recognizes that a party who induces or causes a breach of contract is liable in tort for the resulting damages. *Turner v. Halliburton*, 240 Kan. 1, 12 (1986). The elements for tortious interference are: (1) existence of a contract between plaintiff and a third party; (2) actual or constructive knowledge of the contract by defendant; (3) intentional acts by defendant inducing the third party to breach; (4) the acts are the proximate cause of the breach: and (5) the plaintiff has suffered damage as a direct result. *V.C. Video, Inc. v. Nat'l Video, Inc.*, 755 F.Supp. 962, 970-71 (D. Kan. 1990); *Professional Investors Life Ins. Co. v. Roussel*, 528 F.Supp. 391, 397-98 (D. Kan. 1981).

Plaintiff has alleged these factors. With regard to the third element of the tortious interference claim, plaintiff alleges that Bob's induced RTC to lease the anchor tenant space in disregard of compatibility with Homeland. Homeland also alleges that Bob's

offered additional compensation to RTC for procuring the termination of Homeland's lease. The element of breach of the contract must incorporate the same allegations of good faith dealing that Homeland's complaint for breach of contract used. Assuming the facts to be true for purposes of this motion, plaintiff has alleged a viable claim of tortious interference. Thus, this court will deny the motion to dismiss the claim.

If the court finds that the claim is good, then it should rule on the request for injunctive relief only if plaintiff moves for an injunction. *James Luterbach Const. Co., Inc. v. Adamkus*, 781 F.2d 599, 603 (7th Cir. 1986) (citing Wright & Miller, *Federal Practice and Procedure* §2949 at 187 (Supp. 1992). To get a preliminary injunction, plaintiff must show: (1) irreparable injury; (2) injury to moving party outweighs potential damage from injunction, (3) not adverse to public interest, and (4) substantial likelihood of prevailing on the merits. *Zurn Constructors, Inc. v. B.F. Goodrich Co.*, 685 F.Supp. 1172, 1180 (D. Kan. 1988). Until the plaintiff moves for an injunction, this court need not determine the possibility of this relief. But both sides have briefed whether or not injunctive relief is possible.

Assuming a claim could be made and that plaintiff moves for relief, plaintiff argues that Bob's is a private party and therefore not protected by 12 U.S.C. §1821. Thus, injunctive relief is possible. RTC, however, claims that enjoining Bob's is an indirect way to avoid the statute and enjoin RTC.

The statute states that the court may not take "any action" to restrain the receiver in its functions or powers. 12 U.S.C. §1821(j). If an injunction against Bob's were to be granted, the effect would be to enjoin RTC in its capacity as receiver, the very

result that the statute prevents. There seems no reason to allow a request for injunctive relief to circumvent the expressed statutory language. Thus, the statute says the court cannot take "any action" to restrain the receiver, and this would apply to granting injunctive relief against Bob's.

Thus, if the injunctive relief is sought with the claim of tortious interference, it could not be granted. Plaintiff, however, has not moved for an injunction (Homeland's response to Bob's motion, p. 26),[1] and so if the claim can produce any relief, it should withstand the dismissal motion. Other relief for the tortious interference claim, such as damages, is available. Therefore, it is a claim upon which relief can be granted. Because the court should not dismiss a claim for requesting the inappropriate relief, the motion to dismiss the claim should be denied.

IT IS ACCORDINGLY ORDERED this 13 day of October, 1992 that:

RTC's motion for dismissal of the breach of contract claim is hereby denied. Further, RTC's motion for dismissal of the damages claim based on the failure to maintain the parking lot is hereby denied. (Dkt. No. 22.)

Bob's motion to dismiss the breach of contract claim and request for injunctive relief is hereby granted. (Dkt. No. 9.)

---

[1] Homeland has not moved for an injunction because it claims that Bob's has made representations that it will suspend construction and will not open a store until these proceedings are finally determined.

Bob's motion to dismiss the claim of tortious interference is hereby denied. (Dkt. No. 46.)

/s/ Patrick F. Kelly
PATRICK F. KELLY
CHIEF JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 91-1304-PFK

HOMELAND STORES, INC., PLAINTIFF

v.

RESOLUTION TRUST CORPORATION;
AND BOB'S SUPERSAVER, INC., DEFENDANTS

[Filed Dec. 4, 1992]

MEMORANDUM AND ORDER

In response to this court's earlier order dated October 13, 1992, Homeland Stores (Homeland) and the Resolution Trust Corporation (RTC) moved for reconsideration. Bob's Supersaver (Bob's) moved for judgment on the pleadings and later recharacterized it as a motion for reconsideration. In summary, the motions for reconsideration will be denied.

A motion to reconsider gives the court an opportunity to correct "manifest errors of law or fact and to review newly discovered evidence." *Dees v. Wilson*, 796 F. Supp. 474, 475 (D. Kan. 1992). Thus, the motion will be granted where the court has "obviously misapprehended a party's position, the

facts, or mistakenly has decided issues not presented for determination." *Id.*

Bob's moved for judgment on the pleadings claiming that no case of tortious interference with contract can be made out by plaintiff. This court found that no breach of express contract occurred but that plaintiff had sufficiently alleged a claim of breach of the implied contract of good faith and fair dealing.

Bob's is correct that the good faith provision will not create an anti-competition clause or any obligations inconsistent with the intentions of the parties or the terms of the contract. This court has never found otherwise. But Bob's mischaracterizes the allegations of plaintiff that allowed its claim to survive dismissal. The act of leasing to another party is not the basis for plaintiff's claim, because if it were, Bob's would be correct that this would create the very anti-competition clause the parties struck from the contract. Instead, plaintiff has alleged that Bob's offered RTC additional compensation to terminate Homeland's lease. Competition and intentional injury to one with whom you are in a contract are not the same thing. This difference between active interference and mere competition is what allows plaintiff's claim against Bob's to survive dismissal as well as this motion.

Bob's fallback position, that it had no way of knowing of such implied duties, is unpersuasive. Bob's has cited no case law that supports its position, and in fact, has ignored numerous decisions to the contrary. Restatement (Second) of Contracts § 205 at 99; *Columbian Nat. Title Ins. Co. v. Township Title Servs., Inc.*, 659 F. Supp. 796 806 (D. Kan. 1987); *Meir's Trucking Co. v. United States Const. Co.*, 237 Kan. 692 (1985).

Bob's motion for judgment on the pleadings will be denied. But a defendant may not move under Fed.R.Civ.P. 12(c) until he has answered the complaint. *Dorgan v. Internat'l Harvester Co.*, 585 F.2d 1380 (8th Cir. 1978). Because Bob's has not filed an answer, this court should treat the motion as a motion to dismiss or as a motion for reconsideration of the court's earlier ruling on its motion to dismiss.[1] This motion for reconsideration will be denied.

Plaintiff argues that because Bob's motion to dismiss was denied and Bob's never filed an answer, Bob's motion for judgment on the pleadings effectively closed the pleadings. Thus, plaintiff argues that if the court denies Bob's motion for judgment on the pleadings, it should grant plaintiff's motion for judgment on the pleadings.

A motion for judgment on the pleadings should not be filed before defendant has answered the complaint. *United States v. City of Philadelphia*, 644 F.2d 187, 203 n.25 (3rd Cir. 1980). Plaintiff's motion, however, can be treated as one for default judgment under Fed.R.Civ.P. 55. *Poliquin v. Heckler*, 597 F. Supp. 1004, 1006 (D. Me. 1984); *General Motors Corp. v. Blevins*, 144 F. Supp. 381, 389 (D. Colo. 1956).

The disposition of a motion for default judgment is within the court's discretion. In *Grandbouche v. Clancy*, 825 F.2d 1463, 1468 (10th Cir. 1987), this circuit held that if plaintiff was not prejudiced, and if the court wished to resolve the matter on its merits, then there was no abuse of discretion by the district court in denying the motion for default judgment. This court will deny plaintiff's motion for default

---

[1] Bob's later moved to recharacterize its claim as one for reconsideration. Bob's also moved to answer the complaint.

judgment, especially in light of Bob's recent motion to file an answer.

Plaintiff has asked this court to reconsider its holding that injunctive relief cannot be sought against RTC under these facts. This court held that RTC's leasing of the space was within its power as receiver and therefore could not be enjoined. The leasing of the space was a means of preserving the assets of the failed institution. Plaintiff has presented no authority that persuades the court that its earlier ruling was in error.

Plaintiff only focuses on the issue that the RTC cannot be allowed to breach contracts. The request for injunctive relief focuses on enjoining the RTC from leasing the space at issue. This action by the RTC cannot be enjoined for reasons given in our earlier decision. However, because the RTC did not repudiate the preexisting lease with plaintiff, plaintiff can bring an action for breach of contract. Leasing of space is within the RTC's powers as receiver. If the RTC has assumed the role of lessor, however, any act that violates its duties in that capacity can be subject to suit. Thus, plaintiff has an avenue of relief available to it, but plaintiff does not have a viable claim to injunctive relief. For the same reasons given in our earlier order, plaintiff also has no claim for injunctive relief against Bob's either.

RTC has asked for reconsideration of this court's holding that the administrative claims process does not apply to plaintiff's damage claims on the contract. Plaintiff alleged breach of the implied covenant of good faith dealing and failure to maintain the parking lot pursuant to the lease.

Generally, parties with a claim against the RTC must first exhaust their administrative remedies before filing that claim in court. 12 U.S.C.

§ 1821(d)(13)(D) provides that a court shall not have jurisdiction over "any claim relating to any act or omission of such institution or the Corporation as receiver."

This court, in its earlier memorandum and order, held that RTC's leasing of the space to Bob's was part of its function as receiver. As such, no injunctive relief was available to plaintiff to enjoin the leasing of the commercial space to Bob's. However, once RTC failed to repudiate the preexisting lease with plaintiff, it effectively stepped into the shoes of the lessor for purposes of that lease and is subject to claims on the contract. A contract claim by plaintiff is not a creditor action and therefore is not subject to the claims process.

The RTC refers the court to 12 U.S.C. § 1821(d)(13)(D). This section, however, does not disrupt the court's earlier ruling. The section specifically refers to claims against the RTC as receiver, not a lessor. That is, the statute makes jurisdiction available for claims against the RTC unless the RTC is acting in its capacity as receiver, such as when it is dealing with creditor actions or marshalling assets. In this instance, the claim is one on the contract after the RTC failed to repudiate the contract and became the lessor. This is not a creditor action and therefore does not affect the RTC in its capacity as receiver of the failed institution.

The court is not saying that any post-takeover action by the RTC falls outside of the jurisdictional bar of FIRREA. Plaintiff is incorrect that § 1821 refers only to claims against the pre-takeover institutions. *Rosa v. RTC*, 938 F.2d 383, 392 (3d Cir.), *cert. denied*, 112 S.Ct. 582 (1991). Instead, the court is saying that when the RTC acts in its capacity as receiver, such as dealing with the creditor actions

and the assets of the failed institution, then the court fails to have jurisdiction. But when the RTC has assumed responsibilities under a preexisting lease, it is acting as a lessor and not as a receiver, and the court may entertain these actions.

This decision is consistent with an earlier decision wherein this court held that when the issues involved mitigating damages on behalf of the institution's owners and officers, the court had no jurisdiction. *RTC v. Scaletty*, No. 92-1101-K, LEXIS 15424 (D. Kan. Sept. 30, 1992). In that case, the act of mitigating damages concerned the assets of the failed institution and the issue of creditor rights. The contract claim in this case, however, is independent of any creditor claims.

Courts are somewhat in doubt as to the status of the RTC in its post-receivership capacity. While this court agrees with the RTC's assertion that post-takeover activities are generally subject to the claims process, this court finds this particular instance to be an exception to that general rule. The difference resides in the role of the RTC. The claims process refers to when the RTC acts in its capacity as receiver. The claims before this court, however, deal with the RTC's actions as lessor, not as receiver.

This court must keep in mind the underlying purpose behind the exhaustion requirement of FIRREA. The purpose is to allow the RTC to perform its statutory function of promptly determining claims so as to quickly and efficiently resolve claims against a failed institution. *Rosa*, 938 F.2d at 396. The claim involved in this case concerns actions of the RTC after it had stepped into the shoes of the lessor and assumed the responsibilities under the Homeland lease. Failure to act on the lease in

good faith and to keep the parking lot in usable form are not creditor actions against the RTC and have no connection with the purposes of FIRREA.

Although district courts have taken various positions on this question, this court is in agreement with the court in *RTC v. United Trust Fund, Inc.*, 775 F. Supp. 1465 (S.D. Fla. 1991). The court was presented with the RTC assuming the position as lessee on a contract. In that opinion the court held that if the RTC fails to exercise its statutory right to repudiate a lease under 12 U.S.C. § 1821(e)(1), then the RTC becomes the lessee for all intents and purposes, and thus is "bound by the terms and conditions of the lease." *Id.* at 1469. By failing to repudiate the lease, the RTC became bound by its terms and a claim for damages can lie against the RTC.[2]

---

[2] Although *United Trust Fund* does not address the issue of claims brought against the RTC under 12 U.S.C. § 1821(d)(13)(D), the case does demonstrate that the RTC can assume full responsibilities as lessor under a contract. In those situations, it seems obvious to this court that claims brought against the RTC in its capacity as lessor differ from creditor claims brought against it in its capacity as receiver.

This difference in the RTC's roles and the difference it makes with respect to various claims was also brought up in *Rechler Partnership v. RTC*, No. 90-3091, LEXIS 18714 (D. N.J. Sept. 4, 1990). In that case the court held that there was a difference between creditor claims and claims against the RTC when it acts contrary to its statutory responsibilities. The court found that in the latter situation, no exhaustion of administrative remedies was required. Thus, there is case support for finding that when the RTC acts in its various capacities, not all claims brought against it are creditor claims and thus do not fall under the purpose or wording of the statute.

In opposition, defendant RTC cites some persuasive case law, notably *RTC v. Wayne Coliseum Ltd. Partnership*, 793 F. Supp. 900 (D. Minn. 1992). The defendant in that case had alleged a breach of contract claim as a counterclaim against RTC. The court held that the claim sought a determination of rights with respect to the assets of the failed institution and therefore was subject to § 1821(d)(13)(D) and the court had no jurisdiction to hear the counterclaim. *Id.* at 904 n.5. The Minnesota court, however, was dealing with a counterclaim arising from an RTC action for payment of obligations owed the financial institution. The contract claim arose directly from the issue of this obligation and concerned the very assets owed by the failed institution.

The claim in the case before this court, however, does not present a determination of rights with respect to the assets, but presents a determination of rights with respect to an unrepudiated contract. These contract rights are independent of any obligations owed to the RTC in its capacity as receiver.

The RTC cites several other cases for its support. First, the RTC cites *RTC v. Ryan*, No. J91-0469(L), WL 214536 (S.D. Miss. Aug. 28, 1992), wherein the defendant brought a counterclaim against the RTC for wrongfully seizing funds by placing defendant's check in an escrow account as part of an action against the directors of the failed institution. The court held that the action fell within the wording of the statute and the court had jurisdiction over the counterclaim.

Ryan, however, merely supports this court's notion that certain actions are obviously actions by the RTC as receiver. Dealing with the assets of a failed institution is part of the RTC's position as

receiver. Handling these financial matters differs, however, from when the RTC takes over as lessor on specific contracts. After assuming the role on the contract, the RTC is no longer acting as receiver but as lessor.

Similarly, in *FSLIC v. Shelton*, 789 F. Supp. 1367 (M.D. La. 1992), the FSLIC brought a claim against officers and directors of a failed institution. As a counterclaim, defendants alleged negligence by the federal financial regulators. The court held that the statute requires that federal district courts be divested of subject matter jurisdiction over claims alleging that the FDIC failed to properly collect loans or manage the bank. Collecting loans and managing the bank are obviously what the RTC does as receiver. The actions involve managing the assets of the failed institution. These actions, however, differ from the RTC's position as lessor in this case. Stepping into the shoes of the lessor does not involve managing the assets of the failed institution vis-a-vis creditors.

The case before this court presents specific facts that are of first impression in this district. Although the RTC presents some strong arguments that all post-takeover activities of the RTC are subject to the claims process, this court finds that in post-takeover situations the RTC may wear many different hats. The statute specifically refers to the RTC as receiver when discussing the jurisdictional bar. In light of the underlying purpose of the statute, as well as the multiple roles assumed by the RTC, this court finds that there is a pronounced difference between the RTC acting as receiver and acting as lessor. It is in the second role that the RTC comes before this court, and this court finds that plaintiff's damage claim on the contract does not violate the statute.

IT IS ACCORDINGLY ORDERED this 5 day of December, 1992, that plaintiff's and defendants' motions to reconsider this court's earlier ruling (Dkt. Nos. 78, 80 & 82) are hereby denied.

/s/ Patrick F. Kelly
PATRICK F. KELLY
CHIEF JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 93-3043

HOMELAND STORES, INC., PLAINTIFF-APPELLEE

v.

RESOLUTION TRUST CORPORATION, DEFENDANT-APPELLANT

and

BOB'S SUPER SAVER, INC., DEFENDANTS

ORDER

[Entered Apr. 25, 1994]

Before: SEYMOUR, Chief Judge, GOODWIN*, LOGAN, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, and KELLY, Circuit Judges.

---

*Honorable Alfred T. Goodwin, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By /s/ L. Bahzano
Deputy Clerk

APPENDIX E

12 U.S.C. 1821(d) (Supp. IV 1992) provides in pertinent part as follows:

* * * * *

(3) *Authority of receiver to determine claims*

(A) *In general*

The Corporation may, as receiver, determine claims in accordance with the requirements of this subsection and regulations prescribed under paragraph (4).

(B) *Notice requirements*

The receiver, in any case involving the liquidation or winding up of the affairs of a closed depository institution, shall—

(i) promptly publish a notice to the depository institution's creditors to present their claims, together with proof, to the receiver by a date specified in the notice which shall be not less than 90 days after the publication of such notice; and

(ii) republish such notice approximately 1 month and 2 months, respectively, after the publication under clause (i).

(C) *Mailing required*

The receiver shall mail a notice similar to the notice published under subparagraph (B)(i) at the time of such publication to any creditor shown on the institution's books—

(i) at the creditor's last address appearing in such books; or

(ii) upon discovery of the name and address of a claimant not appearing on the institution's books within 30 days after the discovery of such name and address.

(4) *Rulemaking authority relating to determination of claims*

(A) *In general*

The Corporation may prescribe regulations regarding the allowance or disallowance of claims by the receiver and providing for administrative determination of claims and review of such determination.

(B) *Final settlement payment procedure*

(i) *In general*

In the handling of receiverships of insured depository institutions, to maintain essential liquidity and to prevent financial disruption, the Corporation may, after the declaration of an institution's insolvency, settle all uninsured and unsecured claims on the receivership with a final settlement payment which shall constitute full payment and

disposition of the Corporation's obligations to such claimants.

(ii) *Final settlement payment*

For purposes of clause (i), a final settlement payment shall be payment of an amount equal to the product of the final settlement payment rate and the amount of the uninsured and unsecured claim on the receivership; and

(iii) *Final settlement payment rate*

For purposes of clause (ii), the final settlement payment rate shall be a percentage rate reflecting an average of the Corporation's receivership recovery experience, determined by the Corporation in such a way that over such time period as the Corporation may deem appropriate, the Corporation in total will receive no more or less than it would have received in total as a general creditor standng in the place of insured depositors in each specific receivership.

(iv) *Corporation authority*

The Corporation may undertake such supervisory actions and promulgate such regulations as may be necessary to assure that the requirements of this section can be implemented with respect to each insured depository institution in the event of its insolvency.

(5) *Procedures for determination of claims*

(A) *Determination period*

(i) *In general*

Before the end of the 180-day period beginning on the date any claim against a depository institution is filed with the Corporation as receiver, the Corporation shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim.

(ii) *Extension of time*

The period described in clause (i) may be extended by a written agreement between the claimant and the Corporation.

(iii) *Mailing of notice sufficient*

The requirements of clause (i) shall be deemed to be satisfied if the notice of any determination with respect to any claim is mailed to the last address of the claimant which appears—

(I) on the depository institution's books;

(II) in the claim filed by the claimant; or

(III) in documents submitted in proof of the claim.

(iv) *Contents of notice of disallowance*

If any claim filed under clause (i) is disallowed, the notice to the claimant shall contain—

(I) a statement of each reason for the disallowance; and

(II) the procedures available for obtaining agency review of the determination to disallow the claim or judicial determination of the claim.

(B) *Allowance of proven claims*

The receiver shall allow any claim received on or before the date specified in the notice published under paragraph (3)(B)(i) by the receiver from any claimant which is proved to the satisfaction of the receiver.

(C) *Disallowance of claims filed after end of filing period*

(i) *In general*

Except as provided in clause (ii), claims filed after the date specified in the notice published under paragraph (3)(B)(i) shall be disallowed and such disallowance shall be final.

(ii) *Certain exceptions*

Clause (i) shall not apply with respect to any claim filed by any claimant after the date specified in the notice published under paragraph (3)(B)(i) and such claim may be considered by the receiver if—

(I) the claimant did not receive notice of the appointment of the receiver in time to file such claim before such date; and

(II) such claim is filed in time to permit payment of such claim.

(D) *Authority to disallow claims*

(i) *In general*

The receiver may disallow any portion of any claim by a creditor or claim of security, preference, or priority which is not proved to the satisfaction of the receiver.

(ii) *Payments to less than fully secured creditors*

In the case of a claim of a creditor against an insured depository institution which is secured by any property or other asset of such institution, any receiver appointed for any insured depository institution—

(I) may treat the portion of such claim which exceeds an amount equal to the fair market value of such property or other asset as an unsecured claim against the institution; and

(II) may not make any payment with respect to such unsecured portion of the claim other than in connection with the disposition of all claims of unsecured creditors of the institution.

(iii) *Exceptions*

No provision of this paragraph shall apply with respect to—

(I) any extension of credit from any Federal home loan bank or Federal Reserve bank to any insured depository institution; or

(II) any security interest in the assets of the institution securing any such extension of credit.

(E) *No judicial review of determination pursuant to subparagraph (D)*

No court may review the Corporation's determination pursuant to subparagraph (D) to disallow a claim.

(*F*) *Legal effect of filing*

(i) *Statute of limitation tolled*

For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii) *No prejudice to other actions*

Subject to paragraph (12), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver.

(6) *Provision for agency review or judicial determination of claims*

(A) *In general*

Before the end of the 60-day period beginning on the earlier of—

(i) the end of the period described in paragraph (5)(A)(i) with respect to any claim against a depository institution for which the Corporation is receiver; or

(ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i),

the claimant may request administrative review of the claim in accordance with subparagraph (A) or

(B) of paragraph (7) or file suit on such claim (or continue an action commenced before the appointment of the receiver) in the district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).

(B) *Statute of limitations*

If any claimant fails to—

(i) request administrative review of any claim in accordance with subparagraph (A) or (B) of paragraph (7); or

(ii) file suit on such claim (or continue an action commenced before the appointment of the receiver),

before the end of the 60-day period described in subparagraph (A), the claim shall be deemed to be disallowed (other than any portion of such claim which was allowed by the receiver) as of the end of such period, such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

(7) *Review of claims*

(A) *Administrative hearing*.

If any claimant requests review under this subparagraph in lieu of filing or continuing any action under paragraph (6) and the Corporation agrees to such request, the Corporation shall consider the claim after opportunity for a hearing on the record. The final determination of the Corporation with respect to such claim shall be subject to judicial review under chapter 7 of title 5.

(B) *Other review procedures*

(i) *In general*

The Corporation shall also establish such alternative dispute resolution processes as may be appropriate for the resolution of claims filed under paragraph (5)(A)(i).

(ii) *Criteria*

In establishing alternative dispute resolution processes, the Corporation shall strive for procedures which are expeditious, fair, independent, and low cost.

(iii) *Voluntary binding or nonbinding procedures*

The Corporation may establish both binding and nonbinding processes, which may be conducted by any government or private party, but all parties, including the claimant

and the Corporation, must agree to the use of the process in a particular case.

(iv) *Consideration of incentives*

The Corporation shall seek to develop incentives for claimants to participate in the alternative dispute resolution process.

(8) *Expedited determination of claims*

(A) *Establishment required*

The Corporation shall establish a procedure for expedited relief outside of the routine claims process established under paragraph (5) for claimants who—

(i) allege the existence of legally valid and enforceable or perfected security interests in assets of any depository institution for which the Corporation has been appointed receiver; and

(ii) allege that irreparable injury will occur if the routine claims procedure is followed.

(B) *Determination period*

Before the end of the 90-day period beginning on the date any claim is filed in accordance with

the procedures established pursuant to subparagraph (A), the Corporation shall—

(i) determine—

(I) whether to allow or disallow such claim; or

(II) whether such claim should be determined pursuant to the procedures established pursuant to paragraph (5); and

(ii) notify the claimant of the determination, and if the claim is disallowed, a statement of each reason for the disallowance and the procedure for obtaining agency review or judicial determination.

(C) *Period for filing or renewing suit*

Any claimant who files a request for expedited relief shall be permitted to file a suit, or to continue a suit filed before the appointment of the receiver, seeking a determination of the claimant's rights with respect to such security interest after the earlier of—

(i) the end of the 90-day period beginning on the date of the filing of a request for expedited relief; or

(ii) the date the Corporation denies the claim.

(D) *Statute of limitations*

If an action described in subparagraph (C) is not filed, or the motion to renew a previously filed suit is not made, before the end of the 30-day period beginning on the date on which such action or motion may be filed in accordance with subparagraph (B), the claim shall be deemed to be disallowed as of the end of such period (other than any portion of such claim which was allowed by the receiver), such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

(E) *Legal effect of filing*

(i) *Statute of limitation tolled*

For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii) *No prejudice to other actions*

Subject to paragraph (12), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver.

* * * * *

(13) *Additional rights and duties*

(A) *Prior final adjudication*

The Corporation shall abide by any final unappealable judgment of any court of competent jurisdiction which was rendered before the appointment of the Corporation as conservator or receiver.

(B) *Rights and remedies of conservator or receiver*

In the event of any appealable judgment, the Corporation as conservator or receiver shall—

(i) have all the rights and remedies available to the insured depository institution (before the appointment of such conservator or receiver) and the Corporation in its corporate capacity, including removal to Federal court and all appellate rights; and

(ii) not be required to post any bond in order to pursue such remedies.

(C) *No attachment or execution*

No attachment or execution may issue by any court upon assets in the possession of the receiver.

(D) *Limitation on judicial review*

Except as otherwise provided in this subsection, no court shall have jurisdiction over—

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository

institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or

(ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

(E) Disposition of assets

In exercising any right, power, privilege, or authority as conservator or receiver in connection with any sale or disposition of assets of any insured depository institution for which the Corporation has been appointed conservator or receiver, including any sale or disposition of assets acquired by the Corporation under section 1823(d)(1) of this title, the Corporation shall conduct its operations in a manner which—

(i) maximizes the net present value return from the sale or disposition of such assets;

(ii) minimizes the amount of any loss realized in the resolution of cases;

(iii) ensures adequate competition and fair and consistent treatment of offerors;

(iv) prohibits discrimination on the basis of race, sex, or ethnic groups in the solicitation and consideration of offers; and

(v) maximizes the preservation of the availability and affordability of residential real property for low- and moderate-income individuals.

BEST AVAILABLE COPY

SUPREME COURT, U.S.
FILED
SEP 12 1994
OFFICE OF THE CLERK

No. 94-149

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RESOLUTION TRUST CORPORATION,
Petitioner,

v.

HOMELAND STORES, INC.,
Respondent.

Petition For Writ of Certiorari to the United States Court of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

L.E. STRINGER
(Counsel of Record)
HARVEY D. ELLIS, JR.

CROWE & DUNLEVY
A Professional Corporation
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700

JAMES D. OLIVER
FOULSTON & SIEKEN
700 Fourth Financial Center
Wichita, Kansas 67202
(316) 267-6371

Counsel for Respondent

September, 1994

46PP

QUESTIONS PRESENTED

1. Whether the administrative claims process of 12 U.S.C. §1821(d) is restricted to claims of creditors of an insolvent depository institution arising before the notice given by RTC under §1821(d)(3)(B), or also applies to a claim arising from RTC's breach of duty in its management of receivership assets after its appointment as receiver.

2. When RTC as receiver fails to repudiate an unexpired lease under 12 U.S.C. §1821(e)(1) and then breaches the lease after expiration of the time for submission and processing of virtually all creditor claims, must the other party to the lease submit to the 180-day administrative claims process under 12 U.S.C. §1821(d) before seeking monetary relief in a district court action?

3. Whether the Tenth Circuit's affirmance of the district court's denial of RTC's motion to dismiss respondent's complaint is correct on the alternate ground that respondent is entitled to seek an injunction to prevent the breach of its lease, notwithstanding 12 U.S.C. §1821(j), since RTC's breach is not the exercise of a basic receivership power or function.

PARENTS/SUBSIDIARIES OF CORPORATE RESPONDENT

Respondent Homeland Stores, Inc. is a wholly owned subsidiary of Homeland Holding Corporation, a Delaware corporation. Respondent Homeland Stores, Inc. has no subsidiaries.

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED	i
PARENTS/SUBSIDIARIES OF CORPORATE RESPONDENT	ii
TABLE OF AUTHORITIES	v
ADDITIONAL STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT AND AUTHORITIES	10
I. ANY REVIEW OF THE INTERLOCUTORY DECISION OF THE COURT OF APPEALS SHOULD BE DEFERRED PENDING FINAL JUDGMENT	10
II. HOMELAND HAS NOW PRESENTED AN ADMINISTRATIVE CLAIM, THUS ELIMINATING THE CONTROVERSY OVER THE NEED FOR EXHAUSTION	11
III. ANY REVIEW OF THE ISSUE SOUGHT TO BE RAISED SHOULD AWAIT A CASE WHERE RTC'S NEW "INTERIM STATEMENT" MAY BE PROPERLY CONSIDERED	14
IV. THE TENTH CIRCUIT DECISION WOULD HAVE TO BE AFFIRMED ON NARROWER GROUNDS REGARDLESS OF THE ISSUE SOUGHT TO BE PRESENTED BY RTC	16
V. THE TENTH CIRCUIT CORRECTLY INTERPRETED THE STATUTORY SCHEME IN A MANNER WHICH DOES NOT CREATE THE CONFLICTS SUGGESTED BY RTC	19
CONCLUSION	28

Page(s)

Appendix A

Excerpts from 12 U.S.C. §1821 ..... 1a

Appendix B

Excerpts from Plaintiff's Second Amended Complaint filed December 9, 1991 [RTC Tenth Circuit Appendix 16-31] 1b

Appendix C

Affidavit attached to Resolution Trust Corporation's Motion to Dismiss or for Summary Judgment, filed October 23, 1991 [RTC Tenth Circuit Appendix 13-15] 1c

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson v. Beatrice Foods Co., 900 F.2d 388 (1st Cir. 1990), *cert. denied*, 498 U.S. 891 (1990) 15

Armster v. United States District Court, 806 F.2d 1347 (9th Cir. 1986)..... 15

Barrister Associates v. United States, 915 F.2d 58 (2nd Cir. 1990)..... 13

Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co., 389 U.S. 327 (1967)..... 10

Coit Independence Joint Venture v. FSLIC, 489 U.S. 561 (1989)..... 19, 21, 23

Dean v. Dean, 837 F.2d 1267 (5th Cir. 1988) ... 15

Gaylord Broadcasting Co. v. Cosmos Broadcasting Corp., 746 F.2d 251 (5th Cir. 1984) 13

Gibson v. RTC, 750 F.Supp. 1565 (S.D.Fla. 1990) 18

Henderson v. Bank of New England, 986 F.2d 319 (9th Cir. 1992) 26

Heno v. FDIC, 996 F.2d 429 (1st Cir. 1993) 9, 15, 22

Heno v. FDIC, 20 F.3d 1204 (1st Cir. 1994) 9, 15, 22

Land v. Dollar, 330 U.S. 731 (1947) 11

Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1947) 11

Lloyd v. FDIC, 22 F.3d 335 (1st Cir. 1994) 27

McLane v. Mercedes-Benz of North America, Inc., 3 F.3d 522 (1st Cir. 1993) 13

Page(s)

National Union Fire Ins. v. City Savings, F.S.B., 1994 Westlaw 313110 (3rd Cir. 1994) 9, 17, 19, 21, 24, 25, 26, 27

Office and Professional Employees Intern. Union, Local 2 v. FDIC, 962 F.2d 63 (D.C.Cir. 1992) 17, 23, 25, 26

Parker North American Corp. v. RTC, 24 F.3d 1145 (9th Cir. 1994) 23, 26

Praxis Properties v. Colonial Savings Bank, S.L.A., 947 F.2d 49 (3rd Cir. 1991) 26

Rechler Partnership v. RTC, 1990 U.S. Dist. Lexis 18714 (D.N.J. 1990) 4, 16, 17

Rosa v. RTC, 938 F.2d 383 (3rd Cir.), cert. denied, 112 S.Ct. 582, 116 L.Ed.2d 608 (1991) 9, 14, 18, 24, 26

RTC v. Midwest Fed. Sav. Bank, 4 F.3d 1490 (9th Cir. 1993) 23

RTC v. United Trust Fund, Inc., 775 F.Supp. 1465 (S.D.Fla. 1991) 4, 16

Schokbeton Industries, Inc. v. Schokbeton Products Corp., 466 F.2d 171 (5th Cir. 1972) 17

Topolnycky v. Ukrainian Savings & Loan Ass'n, 799 F.Supp. 36 (E.D.Pa. 1992) 13

United States v. General Motors Corp., 323 U.S. 373 (1945) 11

United States v. Munsingwear, Inc., 340 U.S. 36 (1950) 12, 13

United States v. Williams, 118 L.Ed.2d 352 (1992) 18

Statutes and Rules

12 U.S.C. §1464(d)(6)(C) 18

12 U.S.C. §1821(d) ..... i, 8, 9, 25, 26

12 U.S.C. §1821(d)(3) 19

	Page(s)
12 U.S.C. §1821(d)(3)(A)	20
12 U.S.C. §1821(d)(3)(B)	i, 3, 19
12 U.S.C. §1821(d)(3)(B)(i)	21
12 U.S.C. §1821(d)(3)(C)	19
12 U.S.C. §1821(d)(3)(C)(ii)	3, 13, 20
12 U.S.C. §1821(d)(4)(B)	21
12 U.S.C. §1821(d)(5)(A)	21
12 U.S.C. §1821(d)(5)(A)(i)	3, 12
12 U.S.C. §1821(d)(5)(C)(i)	20
12 U.S.C. §1821(d)(5)(C)(ii)	20
12 U.S.C. §1821(d)(6)(A)	27
12 U.S.C. §1821(d)(10)	1
12 U.S.C. §1821(d)(10)(A)	20, 21
12 U.S.C. §1821(d)(10)(B)	21
12 U.S.C. §1821(d)(13)(D)	5, 19, 22, 23, 24, 25
12 U.S.C. §1821(d)(13)(D)(ii)	21
12 U.S.C. §1821(e)(1)	i, 1, 3, 4, 8, 16
12 U.S.C. §1821(e)(2)	1
12 U.S.C. §1821(e)(3)	1, 3
12 U.S.C. §1821(e)(3)(A)	22
12 U.S.C. §1821(e)(5)	1, 3
12 U.S.C. §1821(j)	i, 1, 4, 18, 20
28 U.S.C §1292(b)	5, 6, 10
12 C.F.R. §360.3(a)(7)	18
Fed.R.Civ.P. 12(b)(6)	1, 4
Fed.R.Civ.P. 54(b)	13
Tenth Circuit Rule 40.1	15

Page(s)

Other Authorities

1 Collier Bankruptcy Manual ¶365.01 (Mathew Bender 1994) 17

8A C.J.S. *Bankruptcy* §227 17

RTC's *Interim Statement of Policy Regarding Procedures To Be Used With Regard to Claims Based Upon Acts or Omissions of the Receiver*, 59 Fed.Reg. 10,663 (adopted March 1, 1994, effective March 7, 1994) 14

Stern Gressman, *et al.*, SUPREME COURT PRACTICE §4.18 (7th Ed. 1993) 10, 11

10 Wright, Miller and Kane, Federal Practice & Procedure §2660 13

13A Wright, Miller and Cooper, Federal Practice & Procedure §3533.10 13

No. 94-149

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RESOLUTION TRUST CORPORATION,
Petitioner,

v.

HOMELAND STORES, INC.,
Respondent.

Petition For Writ of Certiorari to the United States Court of Appeals For The Tenth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ADDITIONAL STATUTORY PROVISIONS INVOLVED

The following additional provisions of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") are relevant, and are reproduced in respondent's Supplemental Appendix ("Supp. App.") at 1a-4a: 12 U.S.C. §1821(d)(10); §1821(e)(1),(2),(3) and (5); and §1821(j).[1]

STATEMENT OF THE CASE

RTC's interlocutory appeal is from denial of its motion to dismiss the complaint of respondent Homeland Stores, Inc. ("Homeland") under Fed.R.Civ.P. 12 (b)(6). RTC App., 17a, 31a.[2]

Homeland is a retail grocery business and owns a store in a Parsons, Kansas shopping center under a lease made nearly 20 years ago. With renewal options

---

[1] Statutory references are to 12 U.S.C. unless otherwise indicated.

[2] In the process of deciding that motion, the district court rejected RTC's additional jurisdictional arguments, as discussed below.

the lease would extend another 32 years. Homeland recently made more than $700,000 in capital improvements to the property, before learning of the breach by RTC complained of in this action.[3]

The lease requires the lessor to maintain a specifically identified attractive anchor tenant in an adjacent area nearly twice the space as Homeland's, and if the anchor tenant cancels its lease to seek Homeland's approval of a substitute similar tenant. After the anchor tenant cancelled and RTC succeeded to the position of lessor, RTC instead leased the anchor tenant space to another grocery business, Bob's Super Saver, Inc. ("Bob's") without consulting Homeland. RTC App., 2a; Supp. App., 2b-3b, ¶¶ 11 and 13.

RTC had no doubt it was breaching Homeland's lease, and even accepted additional consideration conditioned on driving Homeland from the shopping center. RTC attached Homeland's lease to Bob's lease so that it could be referenced in a clause excluding it from warranties that RTC was breaching no other tenant's lease. Supp. App., 3b, ¶¶ 18 and 19. RTC contracted for nearly triple the rent Bob's would otherwise owe if Homeland left the shopping center. In the event Homeland was successfully driven out RTC promised not to lease any property within 5 miles of the shopping center to Homeland again. Supp. App., 3b-4b, ¶ 21.[4]

RTC also promised Bob's not to lease to any additional grocery business. RTC agreed that Bob's could obtain injunctive relief against RTC if it breached any of these exclusivity provisions of the lease.[5]

---

[3] The capital improvements were not specifically alleged but were asserted by Homeland in briefing without dispute both in the district court and Tenth Circuit.

[4] Before doing all of this, RTC did not inquire whether Homeland wanted the anchor tenant space for itself.

[5] RTC's Tenth Circuit App. at 49, Article 12 of Bob's Lease.

After RTC was appointed receiver it could have disaffirmed Homeland's lease under §1821(e)(1). Supp. App., 1a-2a. This would have allowed RTC to lawfully lease to Bob's, and would have given Homeland an immediate claim for damages under §1821(e)(3) and (5). Supp. App., 2a-4a. However, RTC voluntarily assumed the obligations of the lease, then waited more than a year (while Homeland continued to perform and improve the property) before breaching it.[6] RTC made its lease with Bob's fifteen months after it had published its last notice under §1821(d)(3)(B) to "creditors."[7] Creditors have 90 days after the notice to make claims against the receivership. Indeed, the 180 days allowed to *process* "claim[s]" against the receivership assets[8] had already expired six months before RTC breached Homeland's lease. Further, RTC never gave Homeland the mandatory statutory mailed notice owing to any "claimant" under §1821(d)(3)(C)(ii). RTC App. 46a, 25a.

Homeland learned of RTC's lease to Bob's and brought this action against both of them to enjoin them from carrying out the lease. RTC App., 16a. Homeland did not expressly request any money damages from RTC on account of the lease to Bob's; it sought only an injunction.[9] RTC and Bob's both filed motions to dis-

---

[6] As to RTC's assumption of the lease, *see* RTC App., 25a and 38a.

[7] Homeland sued RTC as receiver of Mid Kansas Federal Savings and Loan Association and First Federal Savings and Loan Association of Coffeyville, Kansas. Supp. App., 1b, ¶ 2. The last notice to creditors of these institutions is December 22, 1989. Supp. App., 1c-2c, ¶¶ 5 and 10. Bob's lease was made March 22, 1991. RTC's Tenth Circuit App. at 43.

[8] Section 1821(d)(5)(A)(i), RTC App., 48a.

[9] Thus, RTC's statement at p.4, ¶3 to the contrary is incorrect. The district court opinion even reveals this. RTC App., 16a-17a, 21a-22a. Homeland did seek damages for failure of RTC to repair the parking lot. An unjust enrichment claim was also made but withdrawn. RTC App. 17a, 22a.

miss under Fed.R.Civ.P. 12(b)(6) (RTC App., 17a).[10] Contrary to RTC's position here, RTC relied in its district court motion on notices it gave to creditors of the financial institutions for which it is receiver, attaching an affidavit showing the publication of notices to creditors and that Homeland had presented no claim. Supp. App., 1c-3c.

The district court denied both motions to dismiss. The court concluded it was rendered powerless by §1821(j) (Supp. App., 4a) to enjoin the performance of Bob's lease regardless of any alleged threat of irreparable injury to Homeland. RTC App., 18a-21a, 30a-31a.[11] However, the court reasoned that Homeland's claim should not be dismissed if Homeland was entitled to monetary relief, since Homeland's prayer had requested whatever relief the court found appropriate. RTC App., 22a. The court held that "RTC has assumed the contract and has stepped into the shoes of the lessor." RTC App., 25a. The court agreed with other authority[12] that when RTC fails to exercise its statutory right to repudiate a lease under 12 U.S.C. §1821(e)(1), RTC effectively assumes the obligations of the lease. RTC App., 39a. The court held RTC's voluntary assumption of the lease made the exhaustion requirement inapplicable, since Homeland's complaint that RTC failed to act on the lease in good faith was not a creditor claim within the purposes of FIRREA. RTC App., 38a-39a. Bob's motion to dismiss was also denied. RTC App., 31a-32.

---

[10] RTC moved to dismiss the claim to enjoin performance of Bob's lease under §1821(j). RTC App., 17a-18a; Supp. App., 4a. RTC moved to dismiss the damages claim for failure to repair the parking lot on the ground that Homeland failed to exhaust administrative remedies. RTC App., 26a.

[11] The court's analysis is found in two opinions, the second one on cross-motions for reconsideration. RTC App., 15a, 33a.

[12] *RTC v. United Trust Fund, Inc.,* 775 F.Supp. 1465, 1469 (S.D.Fla. 1991); *Rechler Partnership v. RTC,* 1990 U.S. Dist. Lexis 18714 (D.N.J. 1990).

RTC was granted the necessary certification to pursue an interlocutory appeal under 28 U.S.C. §1292(b). The district court declined to include the question of whether injunctive relief was available in its certification order. However, on appeal Homeland argued that since only an *order* (rather than an issue) is certified for appeal, the availability of injunctive relief should be reached as a controlling issue to determine whether the complaint may be dismissed. The Tenth Circuit agreed in principle, but held that since it agreed with the district court that Homeland was entitled to monetary damages, there was no need to address whether injunctive relief was also available. RTC App., 5a.

The Tenth Circuit found the FIRREA exhaustion procedures inapplicable to claims against the RTC arising from RTC's own conduct, *vis a vis* "creditor" claims grounded in the acts or omissions of the failed institution. The court noted the relatively short deadlines for making and processing claims against the receivership. RTC App., 10a. The court held: "Obviously, claims such as Homeland's arising after receivership and in the indeterminate future due to management actions of the RTC cannot have been contemplated when such deadlines for filing administrative claims were set." RTC App., 11a. After reviewing various other provisions of the exhaustion procedure and the reasoning of decisional law,[13] the court concluded that §1821(d)(13)(D) does not apply to claims like Homeland which arise due to RTC action in managing an institutional asset after an institution enters receivership. RTC App., 6a-14a.

On March 1, 1994 – six days *after* the Tenth Circuit rendered its opinion in this case – RTC adopted the "Interim Statement" which it references at p.9, n.7 of its Petition, containing policy statements

---

[13] Homeland discusses the Tenth Circuit's reasoning in argument, Part V.

very much like its rejected arguments in briefing before the Tenth Circuit, broadly interpreting the FIRREA exhaustion procedures to apply to, *inter alia*, "any claim based upon an act or omission of the receiver with respect to an executory agreement or unexpired lease of the institution . . . . " RTC cited and attached its newly adopted "Interim Statement" as one basis (among others) for seeking rehearing in the Tenth Circuit. The Tenth Circuit denied RTC's petition for rehearing. RTC App., 43.

RTC announced its intention to seek review by writ of certiorari in this Court. Homeland therefore sought to obviate further waste of resources on the issue by presenting an administrative claim, as RTC notes in its footnote 9. That issue is discussed in argument, Part II.

SUMMARY OF ARGUMENT

1. RTC seeks further interlocutory review after having failed to prevail in its 28 U.S.C. §1292(b) appeal of the district court's denial of its motion to dismiss Homeland's complaint. Homeland's action, filed July 23, 1991 against both RTC and Bob's Super Saver, remains stayed in the district court pending the conclusion of RTC's appeal. If certiorari is denied RTC may entirely prevail on Homeland's claim, or the Tenth Circuit (or the district court on revisiting the issue) may determine that Homeland can obtain the injunction for which this action was brought. Any number of additional procedural or negotiated scenarios may resolve the exhaustion issue which RTC seeks to present here. And if the issue is not resolved, RTC will be able to present it after final judgment in the case. *See* Part I, *infra*.

2. Upon RTC's announcement of its intention to present the issue to this Court, Homeland gave RTC just what it wanted: Homeland filed the administrative claim, expressly to obviate further waste of re-

sources, while emphasizing its position that both lower courts' decisions were nevertheless correct. RTC remains unsatisfied.

After more than three years of litigation RTC need not consume the full 180 days (from July 13, 1994) allowed to deny Homeland's claim, but even if it does the issue sought to be presented here is in every practical sense moot. Unless RTC fully allows Homeland's claims Homeland will seek to amend its complaint to reassert them in the pending action. This would obviate another RTC petition for writ of certiorari at the conclusion of this action if Homeland prevails.

RTC perpetuated the controversy over exhaustion in the Tenth Circuit before decision for the sole purpose of seeking favorable precedent (at Homeland's continually mounting expense). RTC openly declared in briefing to that court that it had forsaken a sale of the shopping center involved because of the prospect that other courts might follow the reasoning of the district court decision. Now RTC seeks to perpetuate the controversy further, in interlocutory proceedings, again for the sake of precedent – not for concern with the economic interests involved in this case. *See* Part II, *infra*.

3. The Tenth Circuit's opinion does not take into account RTC's "Interim Statement" cited in its Petition at 9, n.7, because RTC adopted the Interim Statement *after* the issuance of the court's opinion. While the Tenth Circuit properly did not grant rehearing on the basis of the post-decisional Interim Statement, in future cases RTC will be able to rely upon its argument, based on the new Interim Statement, that RTC's policy is to process post-takeover claims for breach of an assumed executory contract or unexpired lease, and that the statute should therefore be construed to require exhaustion of these procedures. RTC may make the same contention in this Court if it fails to

prevail in a future case addressing the issue. Since the timing of the adoption of the Interim Statement procedurally precludes RTC's reliance upon it here, review of the exhaustion question should await a case where the Interim Statement may properly be considered. *See* Part III, *infra.*

4. The Tenth Circuit decision is correct, but even if it were not the result would be. The same result is proper on the narrower ground that RTC voluntarily assumed Homeland's executory lease by failing to exercise its unquestioned right under §1821(e)(1) to repudiate it. Other courts have reached the same result on this narrower ground. The result is also correct because Homeland is entitled to injunctive relief even if it must exhaust administrative procedures to obtain monetary relief. The Tenth Circuit found it unnecessary to address the availability of an injunction because it found Homeland's complaint should not be dismissed in any event. *See* Part IV, *infra.*

5. The Tenth Circuit's decision is a correct interpretation of §1821(d), for the reasons given in its opinion. Section 1821(d) requires the receiver to give a notice to creditors of the failed financial institution, who must within a specified time submit their claims through the administrative process before bringing an action. Not even RTC contends that Homeland was (or is) a creditor entitled to receive such notice, or that Homeland could predict RTC would decide to breach its lease before RTC had processed creditor claims. RTC urges that the administrative process applies regardless of expiration of the time for submitting and processing creditor claims, on the theory that the administrative process covers more than "creditors" — a position indefensible under the language of §1821(d) and rejected by decisional law. Finally, only two other Circuit Courts have expressly reached the issue sought to be presented by RTC. The First Circuit

initially held, like the Tenth Circuit, that exhaustion of administrative procedures was not required as to the receiver's own post-takeover conduct after expiration of the bar date in notices to creditors[14] – then on rehearing revised its opinion (but not the result in the case) based on FDIC's argument that its internal procedures allowed processing of such claims after the creditors' bar date.[15] RTC urges that its post-decision Interim Statement is similar to FDIC's internal procedures. The First Circuit would have decided this case like the Tenth Circuit, since there was no Interim Statement at the time of appellate decision. Moreover, other Circuits do not defer to an agency's views on the scope of statutory jurisdiction of the courts. Only the Third Circuit has otherwise addressed the exhaustion issue contrary to the Tenth Circuit, as noted in the Tenth Circuit's opinion.[16] However, the Third Circuit in *Rosa* did not discuss the question of availability of the claims process, and a subsequent decision by the Third Circuit suggests that the court would find it unconstitutional to withhold jurisdiction from a claimant in Homeland's circumstances providing the Tenth Circuit was correct in concluding that Homeland's claim could not be timely presented in the administrative claims process.[17] *See* Part V, *infra*.

---

[14] *Heno v. FDIC*, 996 F.2d 429 (1st Cir. 1993).

[15] *Heno v. FDIC*, 20 F.3d 1204 (1st Cir. 1994).

[16] RTC App., 14a, citing *Rosa v. RTC*, 938 F.2d 383, 392 (3d Cir.), *cert. denied*, 116 L.Ed.2d 608 (1991).

[17] *National Union Fire Ins. v. City Savings, F.S.B.*, 1994 Westlaw 313110 (3rd Cir. 1994).

ARGUMENT AND AUTHORITIES

I. ANY REVIEW OF THE INTERLOCUTORY DECISION OF THE COURT OF APPEALS SHOULD BE DEFERRED PENDING FINAL JUDGMENT

The Tenth Circuit's decision affirming the district court's denial of RTC's dismissal motion is on an interlocutory appeal under 28 U.S.C. §1292(b). Upon remand Homeland's claims against both RTC and Bob's will be tried, and if RTC prevails, the question sought to be presented here will become moot. Or, the district court might reconsider its opinion that it lacks authority to enjoin performance of the lease to Bob's, and damages for that claim may become unnecessary. Or, the parties may negotiate a settlement. Or the district court may permit Homeland to amend its complaint to reassert the same monetary claims against RTC after RTC denies Homeland's administrative claim. *See* Part II, *infra*.[18]

Assuming the issue is not otherwise resolved, RTC may petition for writ of certiorari after final judgment. "Denial of certiorari at the interlocutory stage of a proceeding is without prejudice to renewal of the questions presented when certiorari is later sought from the final judgment, assuming the questions are properly preserved in the lower courts after the initial denial." Stern, Gressman, *et al.*, SUPREME COURT PRACTICE §4.18 at p.198 (7th Ed. 1993).

Where further proceedings after remand from a Court of Appeals are required, an issue decided by the remanding court is not deemed ripe for this Court's review. *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328 (1967). The exception cited by RTC applies only when the Court of Appeals' ruling "is fundamen-

[18] Similarly, if RTC grants the claim the need for further review will be unnecessary.

tal to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945).[19] The Solicitor General's position since 1980 has been that even in *criminal* cases, in interlocutory appeals "judicial efficiency would be better served by deferring review until rendition of final judgment, so that all claims can be presented in a single petition if, in fact, the defendant is convicted." Stern, Gressman, *et al.*, SUPREME COURT PRACTICE §4.18 at p.196 n.60 (7th Ed. 1993).

Judicial efficiency would be better served here by awaiting final disposition of Homeland's claims in the trial court, where the issue may be resolved (particularly now that an administrative claim has been presented – the issue next addressed).

II. HOMELAND HAS NOW PRESENTED AN ADMINISTRATIVE CLAIM, THUS ELIMINATING THE CONTROVERSY OVER THE NEED FOR EXHAUSTION

In oral argument before the Tenth Circuit one of the first questions asked was why Homeland had not obviated appellate review by presenting an administrative claim. Homeland's counsel explained that it had sought only injunctive relief to prevent RTC's performance of Bob's lease.[20] Until the district court denied RTC's motion to dismiss that claim on the ground that Homeland could obtain alternate monetary relief, the exhaustion issue had been relatively unimportant.

After the Tenth Circuit's decision RTC apprised that court of its intention to seek a writ of certiorari in

---

[19] In the two cases cited by RTC at 12, the Court of Appeals' decisions determined how the cases would be tried on remand, since either this Court or the Court of Appeals held the outcome on the appealed issue dependent on decision of the merits. *Land v. Dollar*, 330 U.S. 731, 735 (1947); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685 (1947). Here, any need for exhaustion does not depend on what Homeland proves at trial.

[20] Damages were sought only for failure to keep the premises in repair.

this Court. Since if a writ of certiorari was granted further review would likely consume more than the maximum 180 days allowed to process an administrative claim,[21] Homeland presented one on July 13, 1994. The claim was expressly for the sole purpose of preventing further waste of the resources of the parties and the courts, and did not concede any legal question. If presenting the claim avoids further delay it may allow adjudication of Homeland's claim before RTC further depletes whatever assets may remain of the insolvent savings and loan associations, so that Homeland will have some hope of more than a nominal remedy.

RTC relegates discussion of Homeland's administrative claim – for the sake of which RTC prosecuted the interlocutory appeal and seeks further review here – to a footnote just prior to the conclusion of its petition. RTC asserts that the case is not moot unless Homeland dismisses its complaint, in which event RTC says it will seek vacation of the judgment and remand with directions to dismiss, citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

This misunderstands the practical effect of Homeland's submission of the administrative claim. Even if certiorari was granted and RTC prevailed, the 180-days allowed for the administrative claims process would have expired before any remand to the district court.[22] Assuming RTC's denial of Homeland's administrative claim, Homeland could amend its complaint to assert the same claims now pending against RTC in the current action against RTC and Bob's Super Saver. Indeed, in a case like this, where RTC has never given the requisite statutory notice to engage the adminis-

---

[21] *See* Section 1821(d)(5)(A)(i). RTC's App., 48a.

[22] Homeland presented its administrative claim on July 13, 1994. The 180 days will expire on January 9, 1995.

trative process to begin with,[23] even if the case was immediately remanded the district court could continue the stay currently in effect pending completion of the administrative process in order to allow such an amendment.[24]

Further, RTC is wrong in suggesting that dismissal of Homeland's complaint is required if RTC prevails on the exhaustion issue. This interlocutory appeal is from the denial of RTC's motion to dismiss Homeland's complaint. In deciding that question, the Tenth Circuit held it did not need to determine the availability of injunctive relief because it agreed with the district court's conclusion that Homeland could obtain damages (RTC's App., 5a). The injunction issue remains open, not only in the Tenth Circuit, but also in the district court.[25]

Nor is the rule of *Munsingwear* relevant in an interlocutory appeal. The general practice on an interlocutory appeal is to dismiss a moot appeal and remand where further proceedings are required.[26] That is the posture here, since mootness as to the

---

[23] Section 1821(d)(3)(C)(ii) requires RTC to give a "claimant" (which is used synonymously with "creditor" in the statute) mailed notice within 30 days after discovery of the claimant's name and address. RTC App., 46a.

[24] *See Topolnycky v. Ukrainian Savings & Loan Ass'n,* 799 F.Supp. 36, 39 (E.D.Pa.1992) (granting stay for completion of administrative process when RTC had failed to give required mailed notice).

[25] While the district court concluded it could not grant an injunction, it emphasized its decision was limited to whether Homeland's claim should be dismissed (RTC's App., 17a and 31a). The court's opinion that injunctive relief is unavailable remains "subject to revision at any time before entry of judgment . . . ." Fed.R.Civ.P. 54(b). *See generally* 10 Wright, Miller and Kane, Federal Practice & Procedure §2660 at p.117 and n.4 as to authority of trial court to revise interlocutory decision before entry of judgment.

[26] *See* 13A Wright, Miller and Cooper, Federal Practice & Procedure §3533.10 at p.436; *Barrister Associates v. United States,* 915 F.2d 58, 59 (2d Cir. 1990); *Gaylord Broadcasting Co. v. Cosmos Broadcasting Corp.,* 746 F.2d 251, 254 (5th Cir. 1984); *McLane v. Mercedes-Benz of North America, Inc.,* 3 F.3d 522, 524-25 n.6 (1st Cir. 1993).

exhaustion issue does not determine the viability of Homeland's complaint. Mootness as to the exhaustion issue does, however, make further litigation over that issue a waste of resources.[27]

This is not the first time RTC has sought to perpetuate this controversy solely for the sake of precedent. In answering Homeland's contention in the Tenth Circuit that RTC knew its ability to liquidate the shopping center was impaired with two grocery stores competing side by side, RTC boasted: "In this case, RTC-Receiver could have sold the shopping center, but held it back in order not to risk mooting this appeal."[28]

III. ANY REVIEW OF THE ISSUE SOUGHT TO BE RAISED SHOULD AWAIT A CASE WHERE RTC'S NEW "INTERIM STATEMENT" MAY BE PROPERLY CONSIDERED

RTC relied in its petition for rehearing before the Tenth Circuit, and now relies here in its petition for writ of certiorari on its new "Interim Statement" that it views the administrative claims process applicable to post-takeover claims, explicitly including those based on RTC's breach of an executory contract or unexpired lease. *See* RTC's Petition at 9, n.7, and RTC's *Interim Statement of Policy Regarding Procedures To Be Used With Regard to Claims Based Upon Acts or Omissions of the Receiver,* 59 Fed.Reg. 10,663 (adopted March 1, 1994, effective March 7, 1994).

---

[27] The exhaustion requirement does not apply to injunctive relief. *See Rosa v. RTC,* 938 F.2d 383, 394-95 (3rd Cir.), *cert. denied,* 116 L.Ed. 2d 608 (1991).

[28] Reply Brief of Appellant RTC filed in Tenth Circuit in this case on September 14, 1993, p.9, n.11.

The Interim Statement was adopted six days after the Tenth Circuit issued its decision. RTC relied on the Interim Statement in its petition for rehearing, but the Tenth Circuit properly did not grant rehearing to consider whether RTC's newly adopted interpretation would change the previous result.[29]

In *Heno v. FDIC,* 996 F.2d 429 (1st Cir. 1993), relied upon in the Tenth Circuit opinion (RTC App., 12a), the court reached a conclusion similar to the Tenth Circuit's, then changed the opinion on rehearing because of an internal agency manual of FDIC allowing FDIC to administratively process a post-bar date claim like the one before the court. *Heno v. FDIC,* 20 F.3d 1204, 1208-10 (1st Cir. 1994). The internal agency manual had clearly been adopted *before* the court issued its opinion, since FDIC argued on rehearing that it would have relied upon it before had it understood the claim was based on contract repudiation. *Id.* at 1208. In view of the procedural posture here, the First Circuit would have decided this case precisely like the Tenth Circuit did, as discussed in argument below, Part V.

In any subsequent case where RTC argues the applicability of the FIRREA exhaustion procedures addressed by the "Interim Statement," RTC will be able to properly rely upon what will then be its *prior* interpretation of the statute as a basis for its position (although Homeland believes the result should be the same). Review of the issue RTC seeks to present here

---

[29] While a party may urge on rehearing that the Court of Appeals has overlooked or misunderstood points of law or fact, this does not entitle a party to seek rehearing based upon events subsequent to the court's decision, except to cite a subsequent controlling judicial opinion. *Armster v. United States District Court,* 806 F.2d 1347, 1356-57 (9th Cir. 1986). *See* Tenth Circuit Rule 40.1 (rehearing granted "only if a significant issue has been overlooked or misconstrued by the court"). *Cf., Anderson v. Beatrice Foods Co.,* 900 F.2d 388, 397 (1st Cir.), *cert. denied,* 498 U.S. 891 (1990) (new issues may not be raised on a petition for rehearing); *Dean v. Dean,* 837 F.2d 1267, 1268 (5th Cir. 1988) (similar). Obviously the RTC's adoption of a new "policy statement" does not qualify under these standards.

should be deferred until RTC can properly rely upon arguments based upon its new Interim Statement, since RTC regards these arguments as a sufficient basis for requiring exhaustion.

IV. THE TENTH CIRCUIT DECISION WOULD HAVE TO BE AFFIRMED ON NARROWER GROUNDS REGARDLESS OF THE ISSUE SOUGHT TO BE PRESENTED BY RTC

Determination of the question sought to be presented by RTC is unnecessary to the result in this case. While the Tenth Circuit's opinion is correct, as discussed in Part V below, the result would be correct for two alternative reasons aside from the court's holding that the exhaustion procedure is inapplicable to post-takeover management actions of RTC.

First, RTC did not simply commit a post-takeover breach of a preexisting contract in this case. As the district court observed, RTC voluntarily assumed the lease under §1821(e)(1), which allows disaffirmance by the receiver of an unexpired lease or other executory contract. Thus the narrower holding of the district court provides sufficient and independent ground for affirmance. The district court held that an action to enforce an unexpired lease voluntarily assumed by RTC was not a claim within the meaning of FIRREA. RTC App., 25a, 38a-39a.

This position is sound, is supported by other authority, and does not present the supposed conflict relied upon by RTC. The district court cited *RTC v. United Trust Fund, Inc.*, 775 F.Supp. 1465 (S.D.Fla. 1991) and *Rechler Partnership v. RTC*, 1990 U.S. Dist. Lexis 18714 (D.N.J. 1990). RTC App., 39a. In *United Trust* RTC failed to timely repudiate a lease to which it was lessee. The court held RTC thereby bound itself to the lease, determined damages against RTC payable from a letter of credit, and reserved jurisdiction to determine further damages, attorney's fees and

costs although the lessor (counterclaimant) had clearly not exhausted the administrative claims process. *Id.* at 1470. In *Rechler Partnership* the court adduced RTC's failure to repudiate an unexpired lease and the fact that plaintiff's claim for breach of the lease did not arise until "long after the expiration of the time period for filing administrative claims," in holding the administrative claims process inapplicable.

Similar rules apply under the analogous procedures of bankruptcy law:[30]

> Where a contract or lease is assumed, the estate becomes liable for performance of the whole contract or lease as if bankruptcy had never intervened, and the estate's obligations are largely determined by the contract or lease itself and by non-bankruptcy law.

8A C.J.S. *Bankruptcy* §227; *see also Schokbeton Industries, Inc. v. Schokbeton Products Corp.*, 466 F.2d 171, 175 (5th Cir. 1972) (discussing "the universally recognized rule that a trustee cannot accept the benefits of an executory contract without accepting the burdens as well."); 1 Collier Bankruptcy Manual ¶365.01 at p.365-4 (Matthew Bender 1994) ("The trustee's assumption of an executory contract operates as a complete transfer of all of the debtor's contractual rights and contractual liabilities.").

RTC's voluntary assumption of the unexpired lease in this case for the benefit of the receiverships furnishes sufficient ground for affirmance regardless of whether the claims process applies to *other* post-takeover claims arising from RTC's management actions. RTC's assumption of a lease or other executory

---

[30] Courts frequently borrow from analogous bankruptcy provisions in interpreting FIRREA. *E.g., Office and Professional Employees Intern. Union, Local 2 v. FDIC*, 962 F.2d 63, 68 (D.C. Cir. 1992); *National Union Fire Ins. v. City Savings, F.S.B.*, 1994 Westlaw 313110, at *8-9 (3rd Cir. 1994).

contract necessitates continuing performance by the other side, thus earning RTC's reciprocal performance[31] – and a normal, expeditious remedy if RTC breaches its obligations after depleting the already-insolvent receivership of its assets through the 180 day processing and payment of creditor claims.[32]

There is a second ground for affirmance, which does not concern exhaustion of administrative remedies at all. If the district court has authority to enjoin performance of Bob's lease, the relief Homeland really wants, then the district court properly denied RTC's motion to dismiss the complaint. The claims procedures do not apply to injunctive relief. *Rosa v. RTC,* 938 F.2d 383, 394-95 (3d Cir.), *cert. denied,* 116 L.Ed. 2d 608 (1991).

Indeed, if a writ of certiorari is granted in this case, Homeland urges the Court to reach the question of whether an injunction may be granted. The Court's standards prevent review of a question by certiorari "only when 'the question presented was not pressed *or* passed upon below,' . . . [and] this rule operates (as it is phrased) in the disjunctive, ..." (Emphasis supplied.) *United States v. Williams,* 118 L.Ed.2d 352, 361 (1992) (applying rule to allow review of question not pressed but passed upon). Homeland has emphatically pressed the claim for an injunction at every stage. Section 1821(j) does not give RTC a license to inflict irreparable injury by breaching any obligation it chooses so long as it is acting in a receivership capacity. Rather, §1821(j) was borrowed from a pre-FIRREA provision, then codified as §1464(d)(6)(C), which this Court held was intended to prohibit "untimely chal-

---

[31] Reciprocal remaining obligations characterize an executory contract. *Gibson v. RTC,* 750 F.Supp. 1565, 1569 (S.D.Fla. 1990) (citing authorities).

[32] In contrast, a party who has rendered full performance of its side of a contract has already earned the receiver's performance, and has every reason to file a proof of claim on an unmatured or contingent claim. FIRREA regulatory claims procedure contemplates this. 12 C.F.R. §360.3(a)(7).

lenges to the receiver's appointment or collateral attacks attempting to restrain the receiver from carrying out its basic functions." *Coit Independence Joint Venture v. FSLIC,* 489 U.S. 561, 575 (1989).

V. THE TENTH CIRCUIT CORRECTLY INTERPRETED THE STATUTORY SCHEME IN A MANNER WHICH DOES NOT CREATE THE CONFLICTS SUGGESTED BY RTC

The Tenth Circuit's holding that FIRREA does not contemplate exhaustion of the administrative claims process as a prerequisite to bringing an action to assert a breach of contract committed *by RTC* in its management of a failed institution's assets after RTC's notice to creditors, and potentially after expiration of the 90-days allowed by that notice for submission of creditor claims and even the 180-days allowed to process those creditor claims, is manifestly correct.

RTC openly admits the notice provisions of FIRREA[33] are not intended to apply to a post-takeover claimant like Homeland. (The admission is not consistent with the motion to dismiss filed by RTC, the denial of which RTC is appealing. Supp. App., 1c-3c, affidavit attached to RTC's motion to dismiss relying on publication notice.)

RTC argues that FIRREA "seemingly" uses the term "creditor" in §1821(d)(3) to denote a narrower class of persons than those who may assert a "claim" under §1821(d)(13)(D). Petition at 8. Notably, this assertion is contrary to the views of the Third Circuit (upon which RTC relies for a conflict between Circuits), as discussed below.[34] More important, the statute itself quickly disposes of the assertion.

---

[33] Section 1821(d)(3)(B) and (C), RTC App. 45a-46a.

[34] *National Union Fire Ins. v. City Savings, F.S.B.,* 1994 Westlaw 313110 (3rd Cir. 1994).

As the Tenth Circuit observed (RTC App., 13a), provision is made for payment of only "creditor• claims" under §1821(d)(10)(A). "Claimant" is used interchangeably with "creditor" in the notice provisions. *See* §1821(d)(3)(A) (stating the receiver may "determine claims" in accordance with subsection containing the notice provisions); §1821(d)(3)(C)(ii) (requiring receiver to give mailed notice to a "claimant" within 30 days after discovery). Further, "claims" are disallowed if filed after the bar date in the publication notice, with exceptions allowed only for any "claim filed by any claimant" who did not receive the requisite notice of the receiver's appointment. Section 1821(d)(5)(C)(i) and (ii). RTC App., 49a-50a.[35]

None of these provisions contemplate application of the claims procedure to a person who has no claim when notice is given to creditors – much less to a party rendering continuing performance under an executory contract assumed by RTC, which RTC might breach at any future date of its pleasure. Otherwise, RTC could breach an obligation after the assets of the insolvent institution were virtually depleted, then require its victim[36] to wait *another six months* while the remaining assets were being further depleted before an action could be filed.

This case is illustrative. RTC made its lease with Bob's a full fifteen months after it published its last notice to creditors, long after the 90 day period to make claims[37] and the additional 180 days to process

---

[35] The exception contemplates a claimant who possessed a claim but did not receive notice, rather than a party like Homeland who had no claim at the time notice to creditors was given because RTC had not yet decided to breach its lease.

[36] RTC has with substantial success taken the position that under §1821(j) (Supp. App., 4a) it may inflict any amount of irreparable injury on any party who stands in its way, unconstrained by the threat of injunctive relief, as long as it is acting as a receiver.

[37] Section 1821(d)(3)(B)(i), RTC App., 45a.

claims.[38] RTC could have waited longer to breach Homeland's lease. RTC could have waited several years, while adjudicating all the claims against the depository institutions. It could have made a final settlement for all unsecured claims against the estate, pursuant to §1821(d)(4)(B) ("Final settlement payment procedure;" RTC App., 46a-47a) – dissipating the receivership of assets available to pay damages long before breaching Homeland's lease. It could have already paid the processed creditor claims pursuant to §1821(d)(10)(A) (Supp. App., 1a);[39] and could even have paid dividends on those claims under §1821(d)(10)(B) (Supp. App., 1a) before making the decision to breach Homeland's lease. The "fact that the receiver's assets may be depleted by interim distributions to other claimants by the time a claimant finally has access to the courts" was cited as one basis for holding that administrative remedies did not need to be exhausted under the predecessor statute to FIREA. *Coit Independence Joint Venture v. Fed. Sav. and Loan Ins. Corp.*, 489 U.S. 561, 587 (1989).

RTC is mistaken in arguing that because §1821(d)(13)(D)(ii) applies the exhaustion procedures to "any act or omission of such institution or the Corporation as receiver" the exhaustion requirement must apply to all claims against the receiver, whether arising before or after the notice to creditors. Claims for acts or omissions of the receiver certainly arise between the receiver's appointment and the publication of notice. An illustration is *National Union Fire Ins. v. City Savings, F.S.B.*, 1994 Westlaw 313110 (3rd Cir. 1994) (relied upon by RTC in its Petition at 10), a declaratory judgment action to rescind insurance pol-

---

[38] Section 1821(D)(5)(A), RTC App., 48a.

[39] Section 1821(d)(10)(A) allows the receiver to pay creditor claims in its discretion after they are determined either through the administrative process or through court adjudication. Supp. App., 1a.

icies issued to a savings bank under a clause automatically cancelling the policies upon appointment of a receiver.

The Tenth Circuit approvingly cited *Heno v. FDIC,* 996 F.2d 429 (1st Cir. 1993), where the court held that a claim arising after the bar date in FDIC's notice to creditors was not subject to the jurisdictional bar of §1821(d)(13)(D), and that the creditor had a monetary claim for repudiation of an executory contract under §1821(e)(3)(A). On rehearing the First Circuit changed its opinion – but not the result – on the basis of FDIC "internal manual procedures" which FDIC ultimately conceded had been satisfied in the case. *Heno v. FDIC,* 20 F.3d 1204, 1208 (1st Cir. 1994). RTC analogizes its new, 1994 "Interim Statement," which expressly applies to unexpired leases and executory contracts, to FDIC's manual procedures. RTC petition at 9, n.7. The "Interim Statement" does not assist RTC here, for the reasons discussed in Part III, *supra.* In fact, it is clear that had the First Circuit been presented with *this* case it would have fully concurred with the reasoning and result reached by the Tenth Circuit. The *sole* basis for changing its opinion was FDIC's preexisting internal manual procedures containing an implicit interpretation allowing FDIC's administrative processing of a post-takeover claim like Heno's. RTC had no similar statement of procedures when the decision was rendered in this case. Since there was no "Interim Statement" in existence at the time of RTC's appeal, briefing, argument, or the decision on its appeal, presumably the First Circuit would have ruled the same way as the Tenth Circuit – and also presumably would not have changed its opinion because RTC adopted a *subsequent* interpretation directly contrary to the appellate decision.

Finally, the First Circuit's deference to the receiver's views on subject matter jurisdiction of the courts under FIRREA is contrary to settled authority in other

Circuits. *E.g., Parker North American Corp. v. RTC,* 24 F.3d 1145, 1149 (9th Cir. 1994) ("We review *de novo* this jurisdictional question [citation omitted], and 'note at the outset that the question we must resolve is not one on which we owe deference to the [RTC]. Congress did not commit questions of court access . . . to the Corporation.' " The court was quoting from *Office & Professional Employees Int'l Union v. FDIC,* 962 F.2d 63, 65 (D.C. Cir. 1992), relied upon by RTC in its petition here). *Cf., Coit Independence Joint Venture v. Fed. Sav. and Loan Ins. Corp.,* 489 U.S. 561, 579-80 (1989) (Courts are guided by congressional intent where a statutory requirement of exhaustion is not explicit, and a court should not defer exercise of jurisdiction under a federal statute unless it is consistent with that intent).[40]

RTC exaggerates from the Tenth Circuit's acknowledgment that its decision conflicts with the Third Circuit's views. Petition at 6 (asserting an acknowledgment of "conflict with decisions in other courts of appeals." (Emphasis supplied.)). The court acknowledged only that a Third Circuit decision conflicted; other decisions cited by RTC and discussed below do not conflict; indeed the RTC represents in its Petition at 10 that the Ninth Circuit disagrees with the Tenth Circuit interpretation notwithstanding that the Ninth Circuit has *approved* the Tenth Circuit's holding in this case. *See Parker North American Corp. v. RTC,* 24 F.3d 1145, 1153 at n.9 and 1154 (9th Cir. 1994).

The Tenth Circuit acknowledged that its decision split with *Rosa v. RTC,* 938 F.2d 383, 392 (3d Cir.) *cert.*

---

[40] The Tenth Circuit also cited as analogous authority *RTC v. Midwest Fed. Sav. Bank,* 4 F.3d 1490 (9th Cir. 1993), where the court held that parties "who are not creditors of a failed depository institution and do not receive statutory notice of the requirement of and deadline for filing claims, who have no independent basis for bringing an action against the RTC and against whom the RTC has not brought suit," are not prevented under §1821(d)(13)(D) from raising defenses to RTC's claims by failure to exhaust administrative remedies. *Id.* at 1496-97.

denied, 116 L.Ed.2d 608 (1991). RTC App., 14a. In *Rosa* plaintiffs were participants in an employees' pension plan of a depository institution under RTC's receivership. *Id.* at 388. The plan was transferred to and assumed by a second depository institution under RTC's conservatorship. *Id.* RTC then announced, as receiver of the first institution, that the assumption was unlawful and terminated benefits under the plan retroactively, effective the date of RTC's appointment. *Id.* at 389. Plaintiffs sued RTC in each of its capacities for both of these institutions (and a third one later created to receive the assets of the second). *Id.* at 390.

The court rejected the contention that the jurisdictional bar of §1821(d)(13)(D) did not apply to claims against RTC arising after its appointment as conservator or receiver. *Id.* at 392. The court did not discuss RTC's notices to creditors, if any, or the bar date for presenting creditor claims – the aspect of the claims procedure upon which the Tenth Circuit opinion turns. Thus, while the court's abstract conclusion that post-takeover claims are not exempt from §1821(d)(13)(D) may superficially conflict with the Tenth Circuit's opinion, the issue found critical in this case was never reached in *Rosa:* whether the jurisdictional bar would apply in the event plaintiffs could no longer timely invoke the claims process.

The Third Circuit emphasized that issue in *National Union Fire Ins. v. City Savings, F.S.B.*, 1994 Westlaw 313110 (3rd Cir. 1994), a declaratory judgment action relied upon by RTC in its petition at 10.[41] In *National Union* the court first *rejected* the premise of RTC's statutory interpretation here – that "creditor" represents a narrower class than persons having "claims" (RTC's petition at 8-9). Instead, the court

---

[41] *National Union* has not yet been released for publication by the Third Circuit, and the Westlaw opinion is prefaced by notation that the opinion may still be revised or withdrawn.

borrowed from analogous bankruptcy law in defining the terms "claim" and "creditor" under §1821(d) (Westlaw pp. *8-9),[42] and observed: "The term 'creditor' is defined in relevant part as an 'entity that has a claim against the debtor.' " *National Union, supra,* at *9. The court found it unnecessary to decide the further issue of whether a "claim" subject to the administrative claims process was asserted by the declaratory judgment action, because the court found that the same issues could be raised as defenses in an action by RTC in any event. *Id.* Since plaintiff could still obtain effective relief regardless of the applicability of the claims procedure, the court held the action barred under §1821(d)(13)(D). *Id.* at *10. The court contrasted cases where an action asserts a right to *payment,* holding that application of §1821(d)(13)(D) would lead to an unconstitutional result if the claimant could not timely invoke the administrative process — *Id.* at *10-11. This comports with the Tenth Circuit's views. RTC App., 11a.[43]

The Third Circuit did not reject the Tenth Circuit's interpretation in any respect sought to be advanced by RTC in its petition here. The court cited the Tenth Circuit's decision, prefaced by the signal "*cf.*," for the statement that several courts had advanced, "or at least suggested" that the ouster of jurisdiction of §1821(d)(13)(D) "should be limited to suits otherwise governed by the administrative claims procedure set

---

[42] *See also Office and Professional Employees Intern. Union, Local 2 v. FDIC,* 962 F.2d 63, 68 (D.C.Cir. 1992) (stating bankruptcy law is a promising source to borrow from in defining terms like "claim," "claimant," and "creditor").

[43] The court in *National Union* noted the decision in *Heno, supra,* interpreting "the administrative claims procedure broadly to allow the receiver to make determinations over a larger class of claims than the plain language of FIRREA might suggest." *National Union, supra* at n.12. The court stated that it appeared RTC could do the same thing. As noted above, RTC did not do so by the time of the Tenth Circuit decision in this case, assuming that it could ever validly narrow federal court jurisdiction by deciding it would entertain a claim otherwise excluded from the claims process.

out in §1821(d)..." *Id.* at *8 and n.8. The court also eschewed a narrow interpretation of the jurisdictional bar out of constitutional concerns applied to future hypothetical cases. *Id.* at *13 and n.21.[44]

Other cases cited by RTC do not even superficially conflict with the Tenth Circuit's holding. *Henderson v. Bank of New England,* 986 F.2d 319 (9th Cir. 1992) was an action asserting both monetary and nonmonetary claims arising from the depository institution's alleged violation of various federal and state statutes more than five years before FDIC was appointed receiver. Plaintiff already possessed the claims involved at the time of FDIC's appointment as receiver.

In fact, the Ninth Circuit has approvingly cited, quoted, and relied upon the Tenth Circuit's holding in this case in its opinion in *Parker North American Corp. v. RTC,* 24 F.3d 1145, 1153 n.9 and 1154 (9th Cir. 1994) (holding preference action in bankruptcy by debtor against depository institution under RTC's receivership was not creditor's claim subject to exhaustion requirement of FIRREA, twice approvingly citing Tenth Circuit's holding for proposition that FIRREA's claims process does not apply to claims relating to RTC's conduct as receiver).

The issue in *Office and Professional Employees Intern. Union, Local 2 v. FDIC,* 962 F.2d 63 (D.C.Cir. 1992) was whether a union had standing to pursue claims under FIRREA for fringe benefits of its members who were discharged upon FDIC's appointment as receiver. *Id.* at 66. The union had timely presented administrative claims for its members. *Id.* at 64 and 66. The court recognized the union's standing to present

---

[44] *Praxis Properties v. Colonial Savings Bank, S.L.A.,* 947 F.2d 49, 64 (3rd Cir. 1991), cited by RTC as "dictum" at 10, briefly notes the holding in *Rosa, supra,* in a case where administrative remedies were found to be exhausted under informal procedures in FIRREA's infancy. It adds nothing to *Rosa* or *National Union,* and does not concern issues sought to be raised by RTC here.

administrative claims for the employees, and to bring a court action to enforce the claims when they were denied by FDIC. No issue was presented as to the necessity of exhausting administrative remedies before presenting a post-takeover claim against the receiver arising from its own management decisions.

The issue in *Lloyd v. FDIC*, 22 F.3d 335 (1st Cir. 1994) was *where* a district court action against FDIC had to be filed, not whether it could be filed.[45] Plaintiff's claims for reformation or cancellation of contracts arose from alleged mutual mistake occurring before FDIC was appointed receiver, and there was no question that plaintiff timely presented an administrative claim. *Id.* at 336.

To summarize the state of the purported conflicts between Circuits: It appears that the First Circuit would have ruled the same way as the Tenth Circuit, since it would have had no RTC "Interim Statement" to consider until one was adopted after the decision on appeal. It is uncertain how the Third Circuit would rule if presented with this case in view of its constitutional concerns for depriving courts of jurisdiction over claims for payment which could not be timely processed under FIRREA, as expressed in *National Union Fire Ins., supra.* None of the other Court of Appeals' decisions cited by RTC even superficially conflicts with the Tenth Circuit's holding, and the Ninth Circuit has approved that holding.

---

[45] After FDIC failed to allow plaintiff's administrative claim, plaintiff filed an action in Rhode Island state court, which FDIC removed to federal court in the District of Columbia. That court transferred the case to federal district court in Rhode Island, which the First Circuit held lacked jurisdiction under §1821(d)(6)(A).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

L.E. STRINGER
(Counsel of Record)
HARVEY D. ELLIS, JR.

-Of the Firm-

CROWE & DUNLEVY
A Professional Corporation
1800 Mid-America Tower
20 N. Broadway
Oklahoma City, OK 73102
Tel. (405) 235-7700

JAMES D. OLIVER
FOULSTON & SIEFKIN
700 Fourth Financial Center
Wichita, Kansas 67202
(316) 267-6371

Attorneys for Respondent

September, 1994

APPENDIX A

EXCERPTS FROM 12 U.S.C. §1821

* * *

(d) Powers and duties of Corporation as conservator or receiver

(10) Payment of Claims

(A) In general

The receiver may, in the receiver's discretion and to the extent funds are available, pay creditor claims which are allowed by the receiver, approved by the Corporation pursuant to a final determination pursuant to paragraph (7) or (8), or determined by the final judgment of any court of competent jurisdiction in such manner and amounts as are authorized under this chapter.

(B) Payment of dividends on claims

The receiver may, in the receiver's sole discretion, pay dividends on proved claims at any time, and no liability shall attach to the Corporation (in such Corporation's corporate capacity or as receiver), by reason of any such payment, for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment

* * *

(e) Provisions relating to contracts entered into before appointment of conservator or receiver

(1) Authority to repudiate contracts

In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease —

(A) to which such institution is a party;

(B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and

(C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

(2) Timing of repudiation

The conservator or receiver appointed for any insured depository institution in accordance with subsection (c) of this section shall determine whether or not to exercise the rights of repudiation under this subsection without a reasonable period following such appointment.

(3) Claims for damages of repudiation

(A) In general

Except as otherwise provided in subparagraph (C) and paragraphs (4), (5), and (6), the liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be —

(i) limited to actual direct compensatory damages; and

(ii) determined as of

(I) the date of the appointment of the conservator or receiver; or

(II) in the case of any contract or agreement referred to in paragraph (8), the date of the disaffirmance or repudiation of such contract or agreement.

(B) No liability for other damages

For purposes of subparagraph (A), the term "actual direct compensatory damages" does not include —

(i) punitive or exemplary damages;

(ii) damages for lost profits or opportunity; or

(iii) damages for pain and suffering.

(C) Measure of damages for repudiation of financial contracts

In the case of any qualified financial contract or agreement to which paragraph (8) applies, compensatory damages shall be —

(i) deemed to include normal and reasonable costs of cover or other reasonable measures of damages utilized in the industries for such contract and agreement claims; and

(ii) paid in accordance with this subsection and subsection (i) of this section except as otherwise specifically provided in this section

* * *

(5) Leases under which the institution is the lessor

(A) In general

If the conservator or receiver repudiates an unexpired written lease of real property of the insured depository institution under which the institution is the lessor and the lessee is not, as of the date of such repudiation, in default, the lessee under such lease may either —

(i) treat the lease as terminated by such repudiation; or

(ii) remain in possession of the leasehold interest for the balance of the term of the lease unless the lessee defaults under the terms of the lease after the date of such repudiation.

(B) Provisions applicable to lessee remaining in possession

If any lessee under a lease described in subparagraph (A) remains in possession of a leasehold interest pursuant to clause (ii) of such subparagraph —

(i) the lessee —

(I) shall continue to pay the contractual rent pursuant to the terms of the lease after the date of the repudiation of such lease;

(II) may offset against any rent payment which accrues after the date of the repudiation of the lease, any damages which accrue after such date due to the nonperformance of any obligation of the insured depository institution under the lease after such date; and

(ii) the conservator or receiver shall not be liable to the lessee for any damages arising after such date as a result of the repudiation other than the amount of any offset allowed under clause (i)(II).

* * *

(j) Limitation on court action

Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or receiver.

APPENDIX B

EXCERPTS FROM PLAINTIFF'S
SECOND AMENDED COMPLAINT

[Filed December 9, 1991]

[RTC Tenth Circuit Appendix 16-31]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 91-1304-K

HOMELAND STORES, INC.,
Plaintiff,

VS.

RESOLUTION TRUST CORPORATION;
AND BOB'S SUPER SAVER, INC.,
Defendants.

SECOND AMENDED COMPLAINT

* * *

2. Defendant Resolution Trust Corporation ("RTC") is created under 12 U.S.C. §1441a, and is either receiver or assignee of (a) Mid Kansas Federal Savings and Loan Association and (b) First Federal Savings and Loan Association of Coffeyville, Kansas (hereafter the "S&Ls"), with respect to the lease which is the subject of this controversy.

* * *

7. The Homeland Lease contains a provision designed to make the Leased Property an attractive site to the lessee by requiring that another specified, compatible tenant lease another substantial area within the shopping center. In particular the Homeland Lease provides in paragraph 20 that the lessor covenants that the lessor will furnish lessee with a copy of a fully executed 20-year lease with T.G.&Y. (the "T.G.&Y. Lease") for a 40,000 square foot area of the

leased premises (the "T.G.&Y. Leased Space") as shown on an exhibit to the Homeland Lease; and that the T.G.&Y. Lease will not be cancelable by lessee except for certain specified reasons set forth in the Homeland Lease. Paragraph 20 of the Homeland Lease requires that the 40,000 square foot area specified on the accompanying exhibit be occupied by T.G.&Y., which is defined as a "principal tenant" therein. The T.G.&Y. Leased Space is the only 40,000 square foot space within the Leased Property available to satisfy the obligations imposed by paragraph 20 of the Homeland Lease, and the Homeland Lease requires the use of the T.G.&Y. Leased Space for the principal tenant as defined therein.

* * *

11. After the vacation of the T.G.&Y. Leased Space by the first tenant to reoccupy that space following T.G.&Y.'s lease cancellation, Homeland learned that RTC was considering, and may have already executed a lease with defendant Bob's Super Saver. RTC did not consult with Homeland or make the required disclosures under paragraph 20 of the Homeland Lease to enable Homeland to determine whether Bob's Super Saver would be an acceptable substitute tenant for that of T.G.&Y. The business of Bob's Super Saver is, like Homeland's, the retail sale of grocery items. Bob's Super Saver is not a "similar" tenant to T.G.&Y. Nor is Bob's Super Saver an "acceptable" substitute tenant to Homeland for that of T.G.&Y.

* * *

13. Homeland has made demand upon defendants that no such lease with Bob's Super Saver be consummated, and that if any such lease has been entered that it be immediately terminated, and that RTC honor its obligations under paragraph 20 of the Homeland Lease. Homeland has learned through discovery that a

lease to Bob's Super Saver was executed, and Homeland has been given no assurance by either defendant that such lease will not be carried out.

* * *

18. Following the initial contacts, Bob's Super Saver prepared and submitted to RTC a proposed lease of the T.G.&Y. Leased Space. Section 2.1 of the proposed lease recited the existence of the lease to Homeland's competing grocery store and required RTC to warrant that the premises were free and clear of any noncompetition restrictions in Homeland's lease or those of other existing tenants of the Shopping Center that would limit Bob's Super Saver's intended use of the premises. This provision also would have required RTC to indemnify Bob's Super Saver against loss or liability resulting from any violation or claim of violation of such restrictive covenants. RTC advised Bob's Super Saver that it could not include these provisions.

19. Bob's Super Saver subsequently prepared and proposed a revised agreement, which became the final lease agreement with RTC dated March 22, 1991 (a copy of which is attached hereto as Exhibit "B".) The provision described in paragraph 18 above was revised to provide that the lease of the T.G.&Y. Leased Space to Bob's Super Saver was not subject to any noncompetition restrictions "except those that are reflected in the pre-existing Shopping Center Lease" with Homeland (as successor to Safeway), which was attached to the Bob's Super Saver lease agreement as an Exhibit.

* * *

21. As additional inducements to RTC to enter into the lease agreement with Bob's Super Saver and to breach its obligations to Homeland, Bob's Super Saver offered and agreed to nearly triple its rent if Homeland vacated the Leased Property during the

first 30 months of Bob's Super Saver's lease agreement and to double the rent if Homeland vacated after the first 30 months and did not compete with Bob's Super Saver within a radius of five miles. Bob's Super Saver also required RTC to agree that it would not lease any other property to Homeland or any other grocer within a radius of five miles of the Belmont Square Shopping Center. Such provisions provide a wrongful and tortious inducement to RTC as lessor to seek to obtain Homeland's removal from the Leased Property and reward RTC for breaching the Homeland Lease.

* * *

PRAYER FOR RELIEF

25. WHEREFORE, Homeland prays for judgment against defendants as follows:

Injunctive Relief

(A) For preliminary and permanent injunctive relief:

(1) enjoining defendants from consummating and/or carrying out any lease for the T.G.&Y. Leased Space constituting the 40,000 square foot area designated in the Homeland Lease, paragraph 20 and Exhibit "A" thereto;

(2) directing RTC to furnish Homeland with the information required under paragraph 20 of the Homeland Lease, including (a) fully executed copies of all leases and amendments thereto with each tenant which has occupied the space formerly occupied by T.G.&Y. for the T.G.&Y. Leased Space, and the prospective lease of any lessee considered for such space in the future, and (b) the information showing the reasons for cancellation of the lease of any principal tenant, whether already having occurred or occurring hereafter;

(3) enjoining RTC from entering into any lease with any tenant for the T.G.&Y. Leased Space without first having ascertained from Homeland that such tenant is deemed a similar tenant which is acceptable to Homeland for such Leased Space;

(4) enjoining and/or ordering specific performance of RTC's obligation to repair the parking area as required under paragraph 4 of the Homeland Lease;

(5) enjoining Bob's Super Saver from interfering with Homeland's Lease and business expectancy and from offering or consummating any consideration or inducement to RTC to eliminate Homeland as a Lessee of RTC.

Damages

(B)(1) For damages from RTC in the amount of all rent paid by Homeland for those months in which the T.G.&Y. Leased Space has not been occupied by a lessee which is similar to T.G.&Y. and acceptable to Homeland, and whose store has been open to the general public for business;

(2) For damages from RTC in an amount which will compensate Homeland for its losses due to the breach of RTC's obligation to keep the common areas at the Belmont Square Shopping Center in good repair.

(C) For cancellation of any lease now in effect between Bob's Super Saver and RTC;

(D) For actual and punitive damages against Bob's Super Saver in excess of $50,000;

(E) For reasonable attorney's fees and costs reasonably expended by Homeland in the prosecution of this action;

(F) For all other relief, legal or equitable, which the Court may determine to be warranted under the circumstances demonstrated by Homeland in this case.

Respectfully submitted,

/s/ James D. Oliver (8604)

-Of the Firm-

Foulston & Siefkin
700 Fourth Financial Center
Broadway at Douglas
Wichita, Kansas 67202
(316) 267-6371

-AND-

L.E. Stringer
Harvey D. Ellis, Jr.

-Of the Firm-

Crowe & Dunlevy
A Professional Corporation
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700

Attorneys for Homeland Stores, Inc.

APPENDIX C

AFFIDAVIT ATTACHED TO RESOLUTION TRUST CORPORATION'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

[Filed October 23, 1991]

[RTC Tenth Circuit Appendix 13-15]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 91-1304-T

HOMELAND STORES, INC.,
Plaintiff,

VS.

RESOLUTION TRUST CORPORATION,
AND BOB'S SUPER SAVER, INC.,
Defendants.

AFFIDAVIT

STATE OF KANSAS, COUNTY OF SEDGWICK ss:

I, Jess Wm. Foster, of legal age and being first duly sworn upon my oath, state:

1. I am the Managing Agent of Mid Kansas Federal Savings and Loan Association of Wichita ("Mid Kansas Federal"), in Receivership and Managing Agent of Mid Kansas Savings and Loan, F.A. Wichita, Kansas, in Receivership.

2. On October 19, 1989, Mid Kansas Federal was place into a receivership by Resolution #89-307 of the Office of Thrift Supervision with Resolution Trust Corporation ("RTC") being appointed as the Receiver for Mid Kansas Federal.

3. On October 19, 1989, a new association was formed named Mid Kansas Savings and Loan Associa-

tion, F.A., Wichita, Kansas ("Mid Kansas Savings"), a Federal Savings and Loan Association, where the majority of the liabilities and all of the assets of Mid Kansas Federal were conveyed to Mid Kansas Savings pursuant to a Purchase and Assumption Agreement.

4. On October 19, 1989, pursuant to Order No. 89-309, the Office of Thrift Supervision declared Mid Kansas Savings to be insolvent and placed it into a conservatorship with RTC being appointed as the Conservator.

5. On October 27, 1989, November 24, 1989, and December 22, 1989, Mid Kansas Federal through its receiver RTC caused a notice to creditors to be published.

6. On February 15, 1991, Mid Kansas Savings was placed into a receivership with RTC being appointed as the Receiver.

7. On February 19, 1991, March 19, 1991 and April 19, 1991, Mid Kansas Savings through its receiver RTC caused a notice to creditors to be published.

8. As of this date, no claim against Mid Kansas Federal, Mid Kansas Savings or RTC as receiver thereof has been received from Homeland Stores, Inc.

9. On August 18, 1989, First Federal Savings and Loan Association of Coffeyville ("First Federal") was placed into a receivership of Order #89-53 of the Office of Thrift Supervision with RTC being appointed as receiver of First Federal.

10. On August 22, 1989, September 22, 1989, and October 23, 1989, First Federal by and through its receiver RTC caused a notice to creditors to be published.

11. As of this date, no claim against First Federal or its receiver RTC has been received from Homeland Stores, Inc.

FURTHER AFFIANT SAITH NAUGHT.

/s/ Jess Wm. Foster

SUBSCRIBED AND SWORN TO before me this 22nd day of October, 1991, by Jess Wm. Foster.

(SEAL) /s/ Joyce J. Meyer
Notary Public

My Appointment Expires
December 18, 1993

No. 94-149

Supreme Court, U.S.
FILED
OCT 3 1994
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR MID KANSAS SAVINGS & LOAN ASSOCIATION AND FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, PETITIONER

v.

HOMELAND STORES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ELLEN B. KULKA
General Counsel
Resolution Trust Corporation
Washington, D.C. 20403

BEST AVAILABLE COPY

13 pp

TABLE OF AUTHORITIES

Cases:	Page
Brown v. *RTC*, Nos. 93-2597 et al. (4th Cir. July 25, 1994)	9
Coit Independence Joint Venture v. *FSLIC*, 489 U.S. 561 (1989)	2
Deakins v. *Monaghan*, 484 U.S. 193 (1988)	4, 5
DiBella v. *United States*, 369 U.S. 121 (1962)	3
Henderson v. *Bank of New England*, 986 F.2d 319 (9th Cir.), cert. denied, 114 S. Ct. 559 (1993)	4, 7
Heno v. *FDIC*, 20 F.3d 1204 (1st Cir. 1994)	7
Land v. *Dollar*, 330 U.S. 731 (1947)	2
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)	2
Lloyd v. *FDIC*, 22 F.3d 335 (1st Cir. 1994)	7
McNeil v. *United States*, 113 S. Ct. 1980 (1993)	4
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938)	2
National Union Fire Ins. v. *City Savings, F.S.B.*, 28 F.3d 376 (3d Cir. 1994)	8-9
Office & Professional Employees Int'l Union, Local 2 v. *FDIC*, 962 F.2d 63 (D.C. Cir. 1992)	8
Rosa v. *RTC*, 938 F.2d 383 (3d Cir.), cert. denied, 112 S. Ct. 582 (1991)	7
Sumitomo Shoji America, Inc. v. *Avagliano*, 457 U.S. 176 (1982)	3
United States v. *General Motors Corp.*, 323 U.S. 373 (1945)	2
United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950)	5
United States v. *Stanley*, 483 U.S. 669 (1987)	3
Volges v. *RTC*, Nos. 94-6061 et al. (3d Cir. Aug. 11, 1994)	8

Statutes: Page

12 U.S.C. 1821(d) (Supp. IV 1992) 3-4
12 U.S.C. 1821(d)(5) (Supp. IV 1992) 4
12 U.S.C. 1821(d)(6) (Supp. IV 1992) 4
12 U.S.C. 1821(d)(13)(D) (Supp. IV 1992) 1, 4, 8, 9
12 U.S.C. 1821(d)(13)(D)(ii) (Supp. IV 1992) 6
28 U.S.C. 1292(b) 3

Miscellaneous:

59 Fed. Reg. (1994):
p. 10,663 5
p. 10,664 5
p. 48,577 (Sept. 22) 5
R. Stern et al. *Supreme Court Practice* (7th ed. 1993) 2

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-149

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR MID KANSAS SAVINGS & LOAN ASSOCIATION AND FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, PETITIONER

v.

HOMELAND STORES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Our petition for a writ of certiorari asks this Court to resolve whether the statutory exhaustion requirement established in 12 U.S.C. 1821(d)(13)(D) (Supp. IV 1992) applies to claims—such as respondent's contract claim—that are based upon the alleged acts or omissions of the receiver of a failed financial institution. Respondent puts forward five arguments why that issue should not be resolved in this case. None of those arguments has merit.

1. Respondent first contends (Br. in Opp. 6, 10-11) that review should be deferred because the appeal in this case was interlocutory. As we explain in our petition (Pet. 11-12), this Court has repeatedly recognized that the

interlocutory posture of a case does not preclude this Court's review if the question presented is "fundamental to the further conduct of the case." *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945). See generally R. Stern et al. *Supreme Court Practice* § 4.18, at 195-198 (7th ed. 1993).

The exhaustion inquiry at issue here is fundamental because it determines whether the district court has subject matter jurisdiction over respondent's suit. See *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 684-685 & n.3 (1949) (review appropriate because jurisdictional issue was fundamental to further conduct of case); *Land* v. *Dollar*, 330 U.S. at 734 & n.2, 739 (same); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52 (1938) (review of order granting preliminary injunction appropriate where "there was an insuperable objection to the maintenance of the suit in point of jurisdiction"). Resolution of the exhaustion issue at this stage would prevent the parties and the trial court from having to devote substantial resources to try this case, only to discover at some later stage that the court lacked jurisdiction. Moreover, Congress crafted the exhaustion requirement to provide the receiver with an opportunity, before suit is brought, to examine outstanding claims and to determine whether to accept or contest them. See *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 584 (1989) (noting the importance of screening thrift receivership claims through a "centralized claims process"). Postponing consideration of the exhaustion requirement until a final judgment is entered in the litigation would defeat the purpose of that statutory provision.

Respondent's objections to review of this interlocutory decision have especially diminished force

because the district court certified and the court of appeals accepted this case for interlocutory review pursuant to 28 U.S.C. 1292(b). Thus, the lower courts agreed that the issue presented here "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Pet. App. 4a (quoting 28 U.S.C. 1292(b)). In cases that otherwise warrant review, this Court has granted petitions for writs of certiorari in litigation that has been properly certified pursuant to that procedure. See, *e.g.*, *United States* v. *Stanley*, 483 U.S. 669, 675-676 (1987); *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 180 n.4 (1982)

There is no merit to respondent's contention (Br. in Opp. 11) that review should be denied here because the government generally opposes petitions by defendants seeking interlocutory review in criminal cases. As this Court has noted, interlocutory review is particularly disfavored in the criminal context, because "the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law." *DiBella* v. *United States*, 369 U.S. 121, 126 (1962). The considerations that guide the government's approach to petitions by defendants in criminal cases, where a final judgment of acquittal generally eliminates any occasion for either party to seek further review, have little relevance to this civil case.

2. Respondent argues (Br. in Opp. 6-7, 11-14) that this case has become moot because, after the court of appeals reached its decision, respondent filed an administrative claim with the RTC. Respondent's belated administrative filing, however, does not have that effect. Section

1821(d) creates an administrative claims procedure for receivership claims and allows judicial review of unsatisfied claims at the conclusion of the administrative process. See 12 U.S.C. 1821(d) (5) and (6) (Supp. IV 1992). Section 1821(d)(13)(D) then states that, "[e]xcept as otherwise provided in this subsection," a court shall not have jurisdiction over receivership claims, including claims based on "any act or omission" of the receiver. 12 U.S.C. 1821(d)(13)(D) (Supp. IV 1992).

The RTC has contended throughout this litigation that the district court below lacked jurisdiction, because respondent failed to comply with the mandatory administrative claims process before respondent filed its action. Respondent cannot overcome that defect by filing an administrative claim after filing its complaint. See, *e.g.*, *McNeil* v. *United States*, 113 S. Ct. 1980 (1993) (affirming dismissal of suit under Federal Tort Claims Act for lack of jurisdiction, because mandatory administrative claim was not filed until after commencement of suit); *Henderson* v. *Bank of New England*, 986 F.2d 319, 321 (9th Cir.) ("Henderson filed his complaint in the district court before exhausting his administrative remedies. The district court lacked subject matter jurisdiction over Henderson's action."), cert. denied, 114 S. Ct. 559 (1993). If it were otherwise, claimants could safely ignore the administrative claims process until a court compelled or litigation tactics dictated compliance.

This case would become moot if respondent agreed to dismiss its still-pending complaint, which was filed improperly without first exhausting the administrative claims procedure. See Pet. 12 n.9. Our position on that issue is consistent with this Court's analysis in *Deakins* v. *Monaghan*, 484 U.S. 193 (1988). The Court explained in that case that it will accept a party's representations that the party's actions have mooted the

lawsuit only if the party's actions truly bring the matter before the courts to a definitive end. See 484 U.S. at 200 n.4. In this case, respondent continues to assert (Br. in Opp. 12-13) that the lower court has jurisdiction to resolve a complaint that respondent filed before exhausting the administrative claims process. If respondent wishes to moot this case, then it must agree to dismiss that complaint and await the outcome of its pending administrative claim before proceeding with litigation.[1]

3. Respondent next argues (Br. in Opp. 7-8, 14-16) that review on the issue presented here should await a case in which the lower courts have had an opportunity to consider the RTC's recently issued interim statement of policy concerning procedures to be used with regard to claims based upon acts or omissions of a receiver. See 59 Fed. Reg. 10,663 (1994); see also 59 Fed. Reg. 48,577 (Sept. 22, 1994) (publication as a proposed rule to be codified at 12 C.F.R. Pt. 1635). This case, however, presents a continuing issue of statutory construction that is not eliminated by the statement of policy. The policy statement sets forth the RTC's official interpretation of the statute, gives formal assurance that the RTC will consider claims based on acts or omissions of the receiver in the administrative process, and explains that such claims are not subject to the statutory bar date requirement governing claims against the failed institution. See 59 Fed. Reg. at 10,664. The policy statement does not eliminate the conflict created by the decision below regarding whether a litigant may choose to bypass the administrative claims

[1] In that event, the Court would issue an order under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950), that "strips the decision below of its binding effect." *Deakins*, 484 U.S. at 200.

procedure. Nor can it be expected to prompt the court of appeals to reconsider its ruling here in a subsequent case. As respondent acknowledges (Br. in Opp. 14), the government apprised the court of appeals of the policy statement through a petition for rehearing. The court nevertheless adhered to its holding that the claims process could be bypassed.

4. Respondent also contends (Br. in Opp. 8, 16-19) that the court of appeals' decision could be sustained on the "narrower grounds" that the "RTC voluntarily assumed [respondent's] executory lease by failing to exercise its unquestioned right under §1821(e)(1) to repudiate it" (*id.* at 8) and that respondent "is entitled to injunctive relief even if it must exhaust administrative procedures to obtain monetary relief" (*ibid.*). The court of appeals, however, did not reach either of those grounds. See Pet. App. 5a (refusing to reach the question "whether injunctive relief is available against the RTC," because that issue is not "an alternate con-trolling question"); *id.* at 12a n.6 (noting that on remand "the issue on the merits presumably would be whether the RTC indeed violated the Homestead lease"). Even assuming that respondent could prevail on those grounds in subsequent proceedings, the rulings would not displace the exhaustion issue, which is logically anterior to resolution of the merits of this case, presents a procedural question of substantial importance, and has created a conflict among the courts of appeals.

5. Finally, respondent contends (Br. in Opp. 8-9, 19-27) that the court of appeals correctly interpreted the statutory exhaustion requirement and that its decision does not create a conflict among the courts of appeals. Those contentions are wrong. As we explained in our petition, Section 1821(d)(13)(D)(ii) (Supp. IV 1992) expressly requires exhaustion of "any claim relating to

any act or omission" of the receiver. See Pet. 3-4, 7-9. The court of appeals' conclusion that the exhaustion requirement does not apply to post-receivership claims is inconsistent with the statutory text and squarely conflicts with the Third Circuit's decision in *Rosa* v. *RTC*, 938 F.2d 383, cert. denied, 112 S. Ct. 582 (1991). Contrary to respondent's suggestion (Br. in Opp. 24), the conflict with *Rosa* is not "superficial[]." The Third Circuit held that post-receivership claims are subject to the claims process, *Rosa*, 938 F.2d at 391-394, and that holding cannot be reconciled with the court of appeals' ruling here. The court of appeals itself expressly acknowledged that its decision conflicted with *Rosa*'s holding that the "jurisdictional bar does encompass a claim arising from post receivership actions of the RTC." Pet. App. 7a n.2, 14a.

As explained in our petition (Pet. 9-10), the court of appeals' decision is inconsistent with other decisions as well. Respondent implicitly acknowledges (Br. in Opp. 22), for example, that the First Circuit's conclusion on rehearing in *Heno* v. *FDIC*, 20 F.3d 1204 (1994)—that the FDIC is entitled to "an opportunity to evaluate post-bar date claims in the first instance," *id.* at 1209—cannot be reconciled with the result here. See also *Lloyd* v. *FDIC*, 22 F.3d 335, 337 (1st Cir. 1994) (applying the statutory provisions governing exhaustion of administrative remedies to a claim that arose as a result of an act or omission of the receiver).[2]

---

[2] Respondent's attempt to distinguish other cases is unpersuasive. For example, respondent asserts (Br. in Opp. 26) that the Ninth Circuit's decision in *Henderson* v. *Bank of New England*, 986 F.2d 319, cert. denied, 114 S. Ct. 559 (1993), does not conflict with the court of appeals' decision here because the claims in *Henderson* arose prior to the appointment of the receiver. The Ninth Circuit observed, however, that "Henderson asserted two

In addition, since the court of appeals has issued its decision, the Second Circuit has directed a post-receivership claimant to exhaust the administrative claims process in a case that is factually similar to the case before this Court, ruling that "[a]lthough § 1821(j) precludes equitable remedies, a plaintiff may still assert a claim for damages against the RTC through the normal claims process." *Volges* v. *RTC*, Nos. 94-6061 et al. (Aug. 11, 1994), slip op. 6364. The Third Circuit has also recently reiterated its view that Section 1821(d)(13)(D)'s exhaustion requirement "is not necessarily limited to suits otherwise governed by the administrative claims procedure set out in § 1821(d)(3), (d)(5), and (d)(6)." *National Union Fire Ins. Co.* v. *City*

---

claims; one monetary, the other nonmonetary. He sought $3.5 million in damages and the right to discover derogatory credit information." 986 F.2d at 321. Henderson's claim for the "right to discover the derogatory credit information" sought that right prospectively against the receiver. The Ninth Circuit nevertheless held that the district court lacked jurisdiction over that claim because Henderson had failed to exhaust the claims process prior to seeking judicial review. *Ibid.*

Respondent also argues (Br. in Opp. 27) that the D.C. Circuit's decision in *Office & Professional Employees Int'l Union, Local 2* v. *FDIC*, 962 F.2d 63 (1992), is distinguishable because "[n]o issue was presented as to the necessity of exhausting administrative remedies." In that case, the plaintiff had tried to comply with the administrative claims process before filing suit, but the FDIC had concluded that the claimant was not eligible to file an administrative claim. See 962 F.2d at 64. The D.C. Circuit rejected the FDIC's position, noting that the statute's "very text appears to contemplate claims beyond those by 'creditor[s] . . . on the . . . books' to whom statutory notice must be sent." *Id.* at 67 (citing 12 U.S.C. 1821(d)(13)(D) (Supp. IV 1992)). Thus, the D.C. Circuit rejected the rationale that the court of appeals relied upon in this case.

Savings, F.S.B., 28 F.3d 376, 386, 392 (1994). And the Fourth Circuit has recently held in an unpublished decision that Section 1821(d)(13)(D)'s exhaustion requirement "applies to claims arising both before and after RTC's appointment as receiver." *Brown* v. *RTC*, Nos. 93-2597 et al. (July 25, 1994), slip op. 5. Thus, the Tenth Circuit's decision stands in marked opposition to prevailing law. The Court should resolve that conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

ELLEN B. KULKA
General Counsel
Resolution Trust Corporation

OCTOBER 1994